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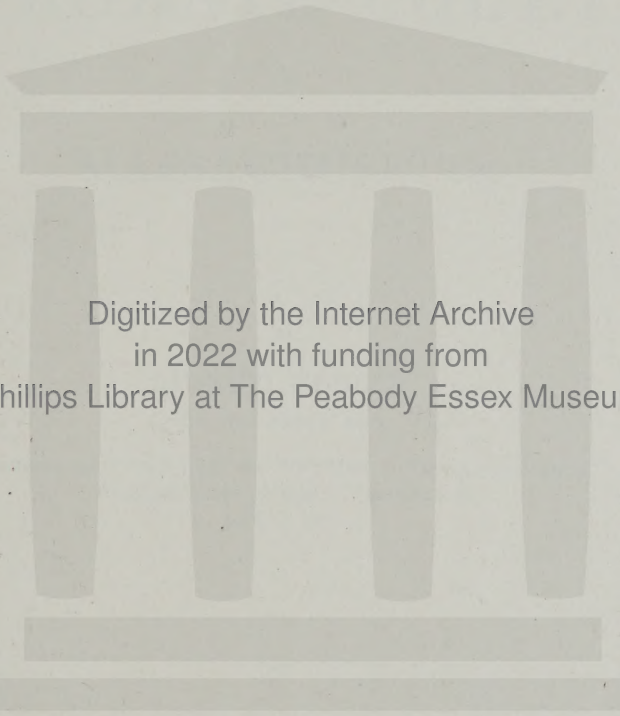
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PRACTICE  
IN THE  
PROBATE COURT  
OF  
MASSACHUSETTS

BY  
SIDNEY PERLEY,  
OF THE ESSEX BAR.

AUTHOR OF "THE LAW OF INTEREST," "MASSACHUSETTS  
ADJUDICATED FORMS," "MORTUARY  
LAW," ETC.

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## PREFACE.

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The purpose of this volume is to present probate court practice in a more detailed and practical form than has been observed in the treatment of the subject in any other book, thus avoiding too frequent recourse to the court officers in reference to minor details as well as to those more important.

SIDNEY PERLEY.

SALEM, DEC. 10, 1897.





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# PRACTICE IN THE PROBATE COURT.

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## CHAPTER I.

### THE PROBATE COURT.

COUNTY courts with common law jurisdiction were established by the governor and assistants of the Massachusetts Bay Colony, under the general authority given to them by the colonial charter, in 1636; and by an act of the general court passed in 1641 these courts were given the power of proving wills and granting letters of administration, an appeal from their decisions lying to the governor and assistants.

As the county courts were held quarterly and the period of waiting was inconvenient, two magistrates and the clerk of each county court were authorized jointly, in 1652, to prove wills and appoint administrators during the time between the sessions of the courts.

This probate jurisdiction and practice continued as long as the colonial charter remained in force, with the exception of the period of authority of Sir Edmund Andros, when he caused wills to be proved, etc., before himself in Boston.

The province charter, granted by William and Mary in 1691, ordained that the governor and council

should "do, execute, and perform, all that is necessary for the probate of wills and granting letters of administration for, touching, and concerning any interest or estate which any person or persons shall have within said province."

Thus the probate jurisdiction was taken from the county courts and vested in the governor and council, who duly appointed deputies in each county to perform these duties under their general supervision. These deputies were called judges of probate. From their decrees appeal was had to the governor and council.

This jurisdiction and practice in probate matters continued until the adoption of the State constitution, which provided for their continuance until the legislature should otherwise legislate. By the act of the legislature of 1783, chapter forty-six, the courts of probate were established, the supreme judicial court being made the court of appeal and the supreme court of probate.

In 1862 the probate court was made a court of record, and has so continued.<sup>1</sup>

#### JURISDICTION.

Statutes were early enacted by the provincial legislature recognizing the probate court and extending its powers and duties, which, since the adoption of the state constitution, have been still more enlarged.

1. The probate court has jurisdiction of the probate of wills, of granting administration of the estates of persons who at the time of their decease were inhabitants of or resident in the commonwealth,

<sup>1</sup> P. S., c. 156, § 1.

and of persons who die out of the commonwealth leaving estate therein to be administered; of the appointment of guardians to minors and others; of all matters relating to the estates of such deceased persons and wards; of petitions for the adoption of children, and for change of names; and of such other matters as have been or may be placed within their jurisdiction by law.<sup>1</sup> This now includes the settlement of estates of absent persons who have been unheard of for fourteen years.<sup>2</sup>

2. It has jurisdiction of the petitions of married women concerning their separate estate, and of the petitions or applications concerning the care, custody, education and maintenance of minor children, provided for by P. S., c. 147, §§ 31, 32, 36.<sup>3</sup>

3. It has jurisdiction in enforcing St. 1891, c. 358, compelling parents to contribute to the support of minor children under guardianship.<sup>4</sup>

4. It has jurisdiction in equity of all cases and matters relating to the administration of estates of deceased persons and to wills and trusts created by will.<sup>5</sup>

5. It may hear and determine in equity all matters in relation to trusts created by will or other written instrument; and it has jurisdiction over all matters relating to the termination of trusts under wills, deeds, indentures, or other instruments.<sup>6</sup>

6. It has jurisdiction in hearing and determining all questions in relation to the tax on collateral

<sup>1</sup> P. S., c. 156, § 2.

<sup>2</sup> St. 1897, c. 447.

<sup>3</sup> St. 1887, c. 332, § 2.

<sup>4</sup> St. 1891, c. 358.

<sup>5</sup> St. 1891, c. 415, § 1. P. S., c. 127, § 34,

so far as it applies to the probate court has been repealed. St. 1891, c. 415, § 5.

<sup>6</sup> St. 1892, c. 116.

legacies and successions existing under St. 1891, c. 425.<sup>1</sup>

7. It may appoint receivers for absent persons who have wives and minor children dependent upon them, under St. 1894, c. 203.<sup>2</sup>

8. It may authorize the marriage of minors under St. 1894, c. 401.<sup>3</sup>

9. It has jurisdiction in the *habeas corpus* proceedings under St. 1894, c. 536.<sup>4</sup>

10. It may enforce specific performance of a written contract for the conveyance of real estate where the owner, before the execution of the contract, is put under guardianship or dies.<sup>5</sup>

11. The judges of the probate courts, except in the county of Suffolk, may commit boys to the reform school, and girls to the industrial school ; may receive complaints, issue warrants, and hear cases against juvenile offenders at such times or places, in or out of their respective counties, as convenience may require. And any judge of a probate court may act in any case for the judge of any other county, whether absent or not, when so requested.<sup>6</sup>

12. The probate court for the county in which is the legal residence of any minor child who is legally indentured or placed in charge of any person or persons, association, or public or private institution, by any state, city, or town board, or by any public or private corporation or body of persons, may compel any such board, corporation, or body of persons, upon the petition of a parent, guardian, or next of kin, to

<sup>1</sup> St. 1891, c. 425, § 14.

<sup>2</sup> St. 1894, c. 203.

<sup>3</sup> St. 1894, c. 401, § 2.

<sup>4</sup> St. 1894, c. 536, § 2.

<sup>5</sup> P. S., c. 142, § 1.

<sup>6</sup> P. S., c. 89, § 16.



give the petitioner information of the whereabouts of any such child, and to permit him to visit such child at such time or times and under such conditions as the court directs in its order, under St. 1896, c. 288.<sup>1</sup>

13. The judge of any probate court may commit insane persons residing within his county to lunatic hospitals, etc.,<sup>2</sup> and dipsomaniacs to the state institution prepared for them.<sup>3</sup>

The probate court has no jurisdiction in cases of fraud or embezzlement, except as they are incidental to other matters within the jurisdiction of the court; and then the original jurisdiction is generally exclusive of that of courts of common law jurisdiction.<sup>4</sup>

For jurisdiction when the officers of the court are interested in the proceedings, see pages 15 and 18.

### *Exclusive or Concurrent Jurisdiction.*

The probate court has exclusive original jurisdiction in all the classes above named, except the fifth and tenth in which the supreme judicial court has concurrent original jurisdiction, the fourth, in which the probate court has jurisdiction concurrently with all other courts having jurisdiction of proceedings in equity, the eleventh, in which it has original jurisdiction concurrently with municipal, district and police courts, trial justices, and commissioners, and the twelfth, in which it has original jurisdiction concurrently with all common law courts.

<sup>1</sup> St. 1896, c. 288.

<sup>2</sup> P. S., c. 87, § 11.

<sup>3</sup> St. 1885, c. 339, § 2.

<sup>4</sup> *Arnold v. Sabin*, 4 Cush. 46 (1849);

*Wade v. Lobdell*, 4 Cush. 510 (1849);

*Sever v. Russell*, 4 Cush. 513 (1849).

*Local Jurisdiction.*

The probate court for the county wherein the deceased resided at the time of his death has exclusive original jurisdiction of the settlement of his estate.<sup>1</sup>

When persons living without the commonwealth but having estate within the same die, the probate court for the county in which said estate is found may appoint an administrator of such deceased person's estate to act within the commonwealth.<sup>1</sup>

The probate court for the county in which the wards reside have exclusive original jurisdiction in the appointment of guardians. This is, also, true of petitions for the adoption of children, and change of names of persons.<sup>1</sup> This rule also applies to petitions of married women concerning their separate estate, and petitions concerning the care, etc., of minor children, under St. 1887, c. 332.<sup>2</sup> Also, to proceedings under St. 1891, c. 358, compelling parents to contribute to the support of their minor children under guardianship.<sup>3</sup> Also, in proceedings to authorize the marriage of minors under St. 1894, c. 401.<sup>4</sup>

In the *habeas corpus* proceeding under St. 1894, c. 536, the probate court for the county in which the petitioner is alleged to be detained has jurisdiction in the matter.<sup>5</sup>

Under St. 1894, c. 203, for the appointment of receivers for absent persons who have wives and minor children depending upon them, the probate court for the county in which such wives and children reside at the time of the commencement of the proceeding,

<sup>1</sup> P. S., c. 156, § 2.

<sup>4</sup> St. 1894, c. 401, § 2.

<sup>2</sup> St. 1887, c. 332, § 2.

<sup>5</sup> St. 1894, c. 536, § 2.

<sup>3</sup> St. 1891, c. 358.

probably has jurisdiction, especially if it was the same county in which the absent person resided when he was within the commonwealth.

The probate court for the county in which an estate is being settled has jurisdiction of all matters relating to its administration in equity or to trusts arising under the will of the decedent, if any.<sup>1</sup>

All matters of trust of which probate courts have jurisdiction, except those arising under wills, are within the jurisdiction of the probate court for the county in which any of the parties interested in the trust reside, or in which any of the land held in trust is situated; but such jurisdiction, when once assumed, excludes the probate court of any other county from taken jurisdiction of any matter subsequently arising in relation to the same trust.<sup>2</sup>

When a case is within the jurisdiction of the probate court in two or more counties, the court which first takes cognizance thereof by the commencement of proceedings retains the same; and the administration or guardianship which is first granted extends to all the estate of the deceased or ward in the commonwealth, and excludes the jurisdiction of the probate court of every other county.<sup>3</sup>

The jurisdiction assumed in any case by the court, so far as it depends on the place of residence of a person, cannot be contested in any suit or proceeding, except in an appeal in the original case, or when want of jurisdiction appears on the same record.<sup>4</sup>

<sup>1</sup> St. 1891, c. 415, § 1.

<sup>2</sup> P. S., c. 141, § 28.

<sup>3</sup> P. S., c. 156, § 3.

<sup>4</sup> P. S., c. 156, § 4. See *Cutts et al. v. Mass.* 16 (1879).

*Haskins*, 9 Mass. 543 (1813); *Holyoke v. Haskins et ux.*, 5 Pick. 20 (1827); and *McFeely, adm'r, v. Scott*, 128

Letters of administration which were originally void for want of jurisdiction in the judge do not become valid by the lapse of twenty years or more.<sup>1</sup>

#### SESSIONS.

The sessions of the probate courts of Massachusetts are as follows:—<sup>2</sup>

For the county of *Barnstable*, at BARNSTABLE on the second Tuesdays of January, February, March, May, June, July, August, September, November and December, and on the first Tuesdays of April and October.<sup>3</sup>

For the county of *Berkshire*, at PITTSFIELD on the first Tuesdays of January, February, March, April, May, June, September, October and December, on the third Tuesday of July, and on the Wednesday next after the first Monday of November; at LEE on the Wednesdays next after the first Tuesdays of January, April and October, and on the Wednesday next after the third Tuesday of July; at ADAMS on the Thursdays next after the first Tuesdays of January and October, on the Wednesday next after the first Tuesday of March, and on the Thursday next after the third Tuesday of July; and at GREAT BARRINGTON on the Wednesdays next after the first Tuesdays of February, May, September and December.

For the county of *Bristol*, at FALL RIVER on the first Fridays of January, April, July and October; at NEW BEDFORD on the first Fridays of February, May, August and November; and at TAUNTON on the first Fridays of March, June, September and December.

For the county of *Dukes*, at EDGARTOWN on the third Mondays of January and July, and on the first Mondays of March and December; at VINEYARD HAVEN IN TISBURY on the third Monday of April and on the first Monday of September; and at WEST TISBURY on the first Monday of June and on the third Monday of October.

For the county of *Essex*, at SALEM on the first Monday of every month and on the third Monday of every month except

<sup>1</sup> *Holyoke v. Haskins et ux.*, 5 Pick. 20 (1827); *Holyoke v. Haskins et ux.*, 9 Pick. 259 (1830).

<sup>2</sup> P. S., c. 156, § 48, amended by statutes as stated in foot notes.

<sup>3</sup> St. 1893, c. 343.

August; at LAWRENCE on the second Mondays of January, March, May, June, July, September and November; at HAVERHILL on the second Mondays of April and October; at NEWBURYPORT on the fourth Mondays of January, March, May, June, July, September and November; and at GLOUCESTER on the fourth Mondays of April and October.

For the county of *Franklin*, at GREENFIELD on the first Tuesday of every month except November; at NORTHFIELD on the second Tuesdays of May and September; at ORANGE on the second Tuesdays of March and December, on the third Tuesday of June, and on the fourth Tuesday of September;<sup>1</sup> at CONWAY on the third Tuesday of May; and at SHELBURNE FALLS on the second Tuesday of February and on the fourth Tuesdays of May and October.

For the county of *Hampden*, at SPRINGFIELD on the first Wednesday of every month except August; at HOLYOKE on the third Wednesdays of January, March, June and October; at PALMER on the second Wednesdays of February, May and September, and the fourth Wednesday of November; and at WESTFIELD on the third Wednesdays of February, May, September and December.<sup>2</sup>

For the county of *Hampshire*, at NORTHAMPTON on the first Tuesday of every month; at AMHERST on the second Tuesdays of January, March, June, August and November; at BELCHERTOWN on the second Tuesdays of May and October; at WILLIAMSBURG on the third Tuesdays of May and October; and at WARE on the second Tuesday of February, third Tuesday of June, and second Tuesdays of September and December.<sup>3</sup>

For the county of *Middlesex*, at CAMBRIDGE on the first, second and fourth Tuesdays; and at LOWELL on the third Tuesday of every month except August.<sup>4</sup>

For the county of *Nantucket*, at NANTUCKET on the Thursday next after the second Tuesday of every month.

For the county of *Norfolk*, at DEDHAM on the first and third Wednesdays; at QUINCY on the second Wednesday; and at HYDE PARK on the fourth Wednesday of every month except August.

For the county of *Plymouth*, at PLYMOUTH on the second Monday of every month, except August; and at BROCKTON on the fourth Monday of every month except July.<sup>5</sup>

<sup>1</sup> St. 1887, c. 46.

<sup>4</sup> St. 1889, c. 182.

<sup>2</sup> St. 1884, c. 294.

<sup>5</sup> St. 1889, c. 269.

<sup>3</sup> St. 1886, c. 145.



For the county of *Suffolk*, at BOSTON on every Thursday in each year, except the first, second, fourth and fifth Thursdays of August.<sup>1</sup>

For the county of *Worcester*, at WORCESTER on the first, second, third and fifth Tuesdays of each month, except August; and at FITCHBURG on the fourth Tuesday of each month except August.<sup>2</sup>

In Middlesex and Suffolk counties, which have two judges each, two sessions of the court may be held in each county at the same time when the public convenience so requires.<sup>3</sup>

When a regular term of any probate court occurs on a legal holiday or on the day of any national or state election, it is held on the next secular day; and all notices, citations, orders and other papers which are made returnable to the regular term are held and deemed returnable to the next secular day, and the proceedings thereon are of the same force and validity as if the notices, citations, orders and other papers had been made returnable to such next secular day.<sup>4</sup>

For matters in equity, for all hearings, for proceedings in contempt, and for making orders and decrees in such matters, the probate courts are always open, except on holidays established by law.<sup>5</sup>

The judge may keep order in court and may punish any contempt of his authority in like manner as such contempt might be punished in the superior court.<sup>6</sup>

He may adjourn the court as occasion may require; and when he is absent at the time appointed for holding a court, the register must adjourn it as he may think necessary, or as he may be ordered by the

<sup>1</sup> St. 1892, c. 202.

<sup>4</sup> St. 1884, c. 141.

<sup>2</sup> St. 1893, c. 348.

<sup>5</sup> St. 1895, c. 215.

<sup>3</sup> St. 1893, c. 379; St. 1894, c. 527, § 1.

<sup>6</sup> P. S., c. 156, § 45.

judge; the register may also adjourn the court when there is a vacancy in the office of judge.<sup>1</sup>

No court can be held by adjournment or otherwise unless the register, assistant register, or a temporary register, is present.<sup>2</sup>

They may transact business out of court at any time and place, when all parties entitled to notice therein assent thereto in writing, or voluntarily appear; and in such cases their decrees must be entered as of such sessions of the court as the convenience of the parties may require.<sup>3</sup>

Orders of notice and other official acts which are passed as a matter of course, and which do not require a previous notice to an adverse party, may be made and done in vacation.<sup>4</sup>

#### JUDGES AND REGISTERS.

##### *Judges.*

In Middlesex and Suffolk counties there are appointed by the governor and council two judges in each county, being known as the first and second, or senior and junior judges, the senior holding the older commission.<sup>5</sup> In each of the other counties there is one judge appointed for each county.<sup>6</sup> Their commissions run during good behavior.<sup>7</sup>

Each judge subscribes his oath of office, which must be kept on file in the office of the probate court for his county.<sup>8</sup>

In the counties of Middlesex and Suffolk the

<sup>1</sup> P. S., c. 156, § 46.

<sup>6</sup> P. S., c. 158, § 1.

<sup>2</sup> P. S., c. 156, § 47.

<sup>7</sup> Const. of Mass., Part 2, c. 2, § 1, art. 9; c. 3, art 1.

<sup>3</sup> P. S., c. 156, § 24.

<sup>4</sup> P. S., c. 156, § 25.

<sup>8</sup> P. S., c. 158, § 2.

<sup>5</sup> St. 1893, c. 379, and St. 1894, c. 527, §1.

judges must arrange for and insure a prompt and punctual discharge of their duties. Different sessions of the courts may be held by the different judges at the same time for the transaction of the business of the courts when the public convenience so requires. All bonds required by law to be given to the judge of each of said probate courts must be made payable to the first judge of the respective courts, and his successors. Citations, orders of notice, and all other processes issued by the register of probate for each of said counties must bear test of the first judge of the court to which they are returnable. Whenever a deposit or investment is made in the name of the judge of either of said probate courts, such deposit or investment must be made in the name of the first judge of the court, and is subject to the order of the court.<sup>1</sup>

When the business of the probate court in the county of Middlesex will permit the junior judge of probate must perform the duties of a judge of probate in any other county, when so required, under the provisions of St. 1894, c. 377, which follow.<sup>2</sup>

When a judge of probate is unable to perform his duties or any part of them from sickness or interest, or when, in his opinion, the court requires the assistance of another judge in order to transact the business with proper despatch, or when there is a vacancy in the office of the judge of probate in any county, his duties, or such of them as he may request, must be performed in the same county by the judge of probate of any other county designated by the judge, or,

<sup>1</sup> St. 1893, c. 379; St. 1894, c. 527, § 1.      <sup>2</sup> St. 1894, c. 527, § 2.

in case of failure to so designate on the part of the judge, designated by the register of probate, from time to time, as the need arises ; provided, that with the written consent of all parties interested, any case may be heard and determined out of said county in the performance of such duties by such other judge, and he may send his written decree in regard thereto to the probate office in which the case is pending. Two or more sessions of either court may be held at the same time, the fact being so stated upon the record.<sup>1</sup>

The register must certify on his records the times during which, or the cases in which, the judge of another county acts.<sup>2</sup>

If a judge is a party or directly interested to the amount of one hundred dollars, exclusive of interest, in a case arising in his county, and such interest appears of record in the case, or if he is absent or unable to perform his duties, and no judge acts for him, or if there is a vacancy in the office in any county, the duties must be performed in the same county by the judge of any other county designated by the register from time to time as necessity or convenience may require.<sup>3</sup>

This prohibition includes cases wherein the judge is a creditor or debtor of the deceased to the amount stated ; and he can have no jurisdiction in the settlement of the estate unless he first relinquishes his claim ; and his acts are void.<sup>4</sup> The fact that he had in

<sup>1</sup> St. 1894, c. 377, § 1. See *Lee v. Wells et al.*, 15 Gray, 459 (1860).

<sup>2</sup> P. S., c. 158, § 5.

<sup>3</sup> P. S., c. 158, § 4. See St. 1894, c. 527, § 2, above ; and St. 1894, c. 377, § 1, above.

<sup>4</sup> *David Cottle, Appellant*, 5 Pick. 483 (1827) ; *Coffin v. Cottle*, 9 Pick. 287 (1830) ; *Sigourney et al. v. Sibley et al.*, 22 Pick. 507 (1839) ; *Gay v. Minot et al.*, *ex'rs*, 3 Cush. 352 (1849).

his own mind decided not to enforce the claim makes no difference.<sup>1</sup>

Although it is improper and illegal for a judge of probate to act as the attorney or agent of an heir of, or other person interested in, an estate within his jurisdiction in any matter relative to any decree, etc., passed by him in his office, yet he does not thereby acquire such an interest in the estate as will oust him of his jurisdiction or render his official acts void.<sup>2</sup>

A judge of probate is disqualified by personal interest to appoint his wife's brother administrator of the insolvent estate of a deceased person, of which her father is a principal creditor; and such a decree of appointment is void.<sup>3</sup>

So if he is a creditor merely in his capacity of executor of another estate.<sup>4</sup> The interest must be legal or beneficiary, and more than a mere general interest in the prosperity of the town he lives in.<sup>5</sup>

He is not disqualified from granting probate of a will, approving the executor's bond, issuing letters testamentary or accepting the resignation of the executor, though one of the creditors is his father-in-law, if such creditor is not a party to the proceedings before him.<sup>6</sup>

He cannot be interested, directly or indirectly, in or benefited by the fees or emoluments arising from any suit or matter pending in his court; nor act as counsel or attorney, either in or out of court, in any

<sup>1</sup> *Sigourney et al. v. Sibley et al.*, 21 Pick. 101 (1838).

<sup>2</sup> *David Cottle, Appellant*, 5 Pick. 483 (1827).

<sup>3</sup> *Hall v. Thayer et al.*, 105 Mass. 219 (1870). See *Williams v. Robinson*, 6 Cush. 333 (1850).

<sup>4</sup> *Bacon, Appellant*, 7 Gray 391 (1856).

<sup>5</sup> *Northampton v. Smith*, 11 Met. 390 (1846).

<sup>6</sup> *Aldrich et al., Appellants*, 110 Mass. 189 (1872).

suit or matter pending before his court, or in an appeal therefrom ; nor be appointed executor, administrator, guardian, commissioner, appraiser, divider or assignee of or upon an estate within the jurisdiction of his court ; nor be interested in the fees or emoluments arising from either of said trusts ; and cannot be retained or employed as counsel or attorney, either in or out of court, in any suit or matter which may depend on or in any way relate to a sentence, decision, warrant, order, or decree made or passed by him ; nor for or against an executor, administrator, or guardian appointed within his jurisdiction, in a suit by or against the executor, administrator, or guardian, as such ; nor in a suit relating to the official conduct of such party ; nor for or against a debtor, creditor, or assignee, in a cause or matter arising out of or connected with any proceedings before him ; nor in an appeal in such cause or matter.<sup>1</sup>

No judge can receive any fee or compensation in addition to his salary for holding courts or acting as judge in any county, nor for anything done in his official capacity, except in cases expressly provided by law.<sup>2</sup>

When a judge of probate desires to be appointed guardian of his minor child, being an inhabitant of or residing in the same county, such appointment may be made and all subsequent proceedings in regard thereto had in the probate court of the most ancient adjoining county.<sup>3</sup>

Bonds required to be given to the judge must be given, in case of vacancy, to the acting judge, and

<sup>1</sup> P. S., c. 158, §§ 2, 21.

<sup>3</sup> P. S., c. 158, § 22.

<sup>2</sup> P. S., c. 158, § 26.



his successors in office, and all business must be done in his name, or the name of the court; and bonds may be approved, and other acts required to be done or certified by the judge may be approved, done, or certified by the acting judge.<sup>1</sup> The judge, who is thus acting out of his county becomes an "acting judge," and should so subscribe his acts.

The judges must make and issue all warrants and processes necessary or proper to carry into effect the powers granted to them; and when no form for a warrant or process is prescribed by statute or by the rules of the court, they must frame one in conformity with the principles of law and the usual course of proceedings in this commonwealth.<sup>2</sup>

The fact that exception was not taken to the jurisdiction of the judge does not render a decree valid.<sup>3</sup>

All decrees and orders of the probate courts and of the judges thereof must be made in writing.<sup>4</sup>

### *Registers.*

A register of probate is chosen in each county every fifth year, beginning with the year 1883.<sup>5</sup>

Every register of probate, before entering upon the duties of his office, must take the oath prescribed by the constitution, and by P. S., c. 158, § 6; and the oath must be filed in the probate court.<sup>6</sup> He must also give bond.<sup>7</sup> He has the care and custody of all books, documents and papers appertaining to the court of which he is register, or deposited with the

<sup>1</sup> P. S., c. 158, § 5.

<sup>4</sup> P. S., c. 156, § 27.

<sup>2</sup> P. S., c. 156, § 23.

<sup>5</sup> P. S., c. 10, § 4; St. 1890, c. 423, § 191.

<sup>3</sup> *Sigourney et al. v. Sibley et al.*, 21

<sup>6</sup> P. S., c. 158, § 6.

Pick. 101 (1838).

<sup>7</sup> P. S., c. 158, § 7.

records or filed in the probate office, and must carefully preserve the same, to be delivered to his successor. He must also perform such other duties appertaining to his office as may be required by law or prescribed by the judge.<sup>1</sup> He may at any time receive and place on file petitions and applications to the probate court, and may issue proper orders of notice and citation in the same manner and with the same effect as if issued by the judge; but when the judge deems such notice insufficient, he may order such further notice as the case requires.<sup>2</sup> He may issue process of attachment and of execution, and all other proper processes, and all warrants, letters and licenses, necessary to carry into effect any order or decree of his court, and the same may run into any county, and shall be executed and obeyed throughout the state. He may appoint appraisers to make any inventory required to be returned to the court.<sup>3</sup>

The judges for the counties of Essex, Middlesex, Norfolk, Suffolk and Worcester, may each appoint an assistant register of probate for his county, who shall hold his office for three years, unless sooner removed by the judge. He must be sworn and must give bond.<sup>4</sup> He must perform his duties under the direction of the register, etc.<sup>5</sup> P. S., c. 158, §§ 19, 20, provides for a temporary register.

No register, or assistant register, or any other person engaged in the performance of any of the duties of the probate office in any county, can be interested

<sup>1</sup> P. S., c. 158, § 8.

<sup>4</sup> P. S., c. 158, § 11.

<sup>2</sup> P. S., c. 158, § 9.

<sup>5</sup> P. S., c. 158, § 14; which also pro-

<sup>3</sup> P. S., c. 158, § 10, amended by St. vides when he may act as register.

1894, c. 199.

in or benefited by the fees or emoluments arising from any suit or matter pending before the probate court of such county ; nor act as counsel or attorney, either in or out of court, in any suit or matter pending before said court, or in an appeal therefrom ; nor be appointed executor, administrator, guardian, commissioner, appraiser, or divider, of or upon an estate within the jurisdiction of such court ; nor be interested in the fees or emoluments arising from either of said trusts.<sup>1</sup>

He must receive no fee or compensation in addition to his salary for anything done in his official capacity, except in cases expressly provided by law.<sup>2</sup>

When a register of probate desires to be appointed guardian of his minor child, being an inhabitant of or residing in the same county, such appointment may be made, and all subsequent proceedings in regard thereto had in the probate court of the most ancient adjoining county.<sup>3</sup>

#### RECORDS.

The register must record in books kept for that purpose all decrees and orders of the court, all wills proved in the court, with the probate thereof, all letters testamentary and of administration, all warrants, returns, reports, accounts, and bonds, and all other acts and proceedings required to be recorded by the rules of the court by special orders of the judge.<sup>4</sup>

Each register must keep a docket of all cases and matters in the probate court of his county, and must enter in such docket every case or matter by its ap-

<sup>1</sup> P. S., c. 158, § 21.

<sup>2</sup> P. S., c. 158, § 26.

<sup>3</sup> P. S., c. 158, § 22.

<sup>4</sup> P. S., c. 156, § 27.

propriate title and number, with short memoranda of all proceedings had and papers filed therein, with the dates when the proceedings were had or papers filed, and with reference to the places where the proceedings or papers are recorded, if there is a record thereof. He must also keep a separate alphabetical index of such cases and matters, which index must refer both to the docket and to the files of the court. Such docket and index must at all reasonable times be open to public inspection.<sup>1</sup>

#### *Amendment of Records.*

Courts of record have power, at any time, of their own motion or on the suggestion of any party interested, and without notice to any one, to correct the mistakes or supply the omissions of their clerks or recording officers, so as to make the record conform to the truth of the case; and they are the exclusive judges of the necessity and propriety of so amending and extending their records, and of the proofs and the sufficiency of the proofs on which to proceed.<sup>2</sup> The court has power to amend the amended record, either to make it as it was originally or otherwise.

#### *Recording Receipts.*

Any paper or instrument discharging a claim or purporting to acknowledge the performance of a duty or the payment of money for which an executor, administrator, guardian, or trustee is chargeable or accountable in a probate court, must, upon the request of a party interested, be recorded in the registry of

<sup>1</sup> P. S., c. 156, § 28.

<sup>2</sup> *Balch et ux. v. Shaw*, 7 Cush. 282 (1851).

said court; and the registers of probate in their respective counties must enter, record, index, and certify any original paper or instrument offered as aforesaid, and receive for such services the like compensation as registers of deeds would be entitled to demand for like services, which compensation must be paid by the person leaving such paper or instrument for record, at the time of leaving the same.<sup>1</sup>

#### TAKING ORIGINAL WILLS FROM REGISTRY.

The probate court in which a will has been duly proved, allowed, and recorded, may, after the expiration of the thirty days within which an appeal may be taken from the decree admitting it to probate, upon the petition of the executor or of a legatee named in the will, or of any person interested in the estate of the testator, and after such notice as the court may require and a hearing thereon, permit the original will, if it appears to be necessary for the purpose, to be taken from the files of such court and to be used in a foreign country for the purpose of establishing the right or title of such executor, legatee, or person to the estate of the testator in such country.<sup>2</sup>

#### FREE COPIES OF ORIGINAL PAPERS.

The registers of the probate courts must make, without charge, one certified copy of all wills proved, inventories returned, and accounts settled; of all partitions of real estate, and assignments of dower; and of all orders and decrees of the court; and deliver such copies, when demanded, to the executor,

<sup>1</sup> P. S., c. 156, § 39.

<sup>2</sup> P. S., c. 156, § 41.

administrator, guardian, widow, heir, or other party principally interested.<sup>1</sup>

## NOTICE.

In any proceeding in a probate court the notice required by law may be dispensed with when all parties entitled thereto signify in writing their assent to such proceeding or waive notice.<sup>2</sup>

Persons having business in a probate court may select such newspaper as they may prefer for the publication of legal notices ordered upon their publications; but if the judge deems a newspaper thus selected insufficient to give due publicity, he may order the publication in one other newspaper.<sup>3</sup>

All processes and notices in any proceeding served upon an attorney-at-law duly authorized, who has entered his appearance as attorney for the party represented by him, have the same force and effect as if served upon the parties themselves. The supreme court and the probate courts must have rules and regulations so as to require notice to be given to such attorney or to the parties interested of any motion, hearing, or other proceeding proposed in any case before said courts.<sup>4</sup>

When the rules of court, made under authority of the statute, provide that two days must elapse between the date of the last publication of a notice and the return day, one day is insufficient, whether so ordered by the court or not, and all proceedings based upon such a notice are invalid.<sup>5</sup>

<sup>1</sup> P. S., c. 156, § 40.

<sup>4</sup> St. 1890, c. 420.

<sup>2</sup> P. S., c. 156, § 37.

<sup>5</sup> *Baker et al. v. Blood*, 128 Mass. 543

<sup>3</sup> P. S., c. 156, § 38.

(1880).



An order to give notice, by publishing "three weeks successively" in a newspaper is sufficient if published once in each calendar week three calendar weeks successively, and it makes no difference how many days elapse between the days of publication;<sup>1</sup> i. e., a notice published on Saturday, July 2, Tuesday, July 5, and Monday, July 11, is sufficient, whether the newspaper is a daily or weekly.

Where notice of an auction sale is required to be given "thirty days previous" to the sale, and there is no direction that the last publication shall be thirty days before the sale, it is sufficient if the first publication is thirty days before the day of sale.<sup>2</sup>

#### SERVICE OF PROCESS.

Any person can usually serve probate notices, but it is advisable to employ a sheriff or constable.

The judge of probate for the county of Suffolk must appoint a constable of the city of Boston to attend upon the sessions of the probate court for said county, and to serve such orders, precepts and processes issuing therefrom, or from the judge thereof, as may be committed to him.<sup>3</sup>

#### ATTORNEYS.

Any party may appear in the probate court in person, or by an attorney authorized to practice in the courts of this commonwealth, or by a person authorized by a writing, filed in said court, for that purpose.<sup>4</sup>

<sup>1</sup> *Bachelor v. Bachelor*, 1 Mass. 256 (1804); *Brewer v. Springfield*, 97 Mass. (1813).

152 (1867). See *Frothingham v. March*, 1 Mass. 247 (1804); *Dexter v.* <sup>3</sup> St. 1884, c. 140.

*Shepard et al.*, 117 Mass. 480 (1875). <sup>4</sup> Probate rules of court, I.

Any person appearing for another in the probate court must enter his appearance in writing, giving his name, place of residence or business, the matter in which, and the name or names of the person or persons for whom he appears. Such writing must be filed with the register and the fact entered in the docket.<sup>1</sup>

Each petition is considered a separate proceeding, and appearance of an attorney entered accordingly.<sup>1</sup>

If a party changes his attorney, pending any proceeding, the name of the new attorney must be substituted on the docket for that of the former attorney, and notice thereof given to the adverse party; and until such notice of the change of an attorney all notices given to or by the attorney first appointed are considered in all respects as notice to or from his client, except in cases in which by law the notice is required to be given to the party personally; provided, however, that no interested party shall be prevented from appearing for himself in the manner provided by law; and in such case the party so appearing is subject to the same rules that are or may be provided for attorneys in like cases, so far as the same are applicable.<sup>2</sup>

When the authority of an attorney-at-law to appear for any party is demanded, if the attorney declares that he has been duly authorized to appear, by an application made directly to him by such party, or by some person whom he believes to have been authorized to employ him, such declaration is evidence of authority to appear and prosecute or defend in any action or proceeding.<sup>3</sup>

<sup>1</sup> Probate rules of court, I.

<sup>3</sup> Probate rules of court, III.

<sup>2</sup> Probate rules of court, II.

Any attorney-at-law duly authorized may enter his appearance as attorney for the party represented by him in any proceeding in the probate court. All processes and notices served upon such attorney have the same force and effect as if served upon the parties themselves.<sup>1</sup>

When another person than the party appears for a petitioner he should endorse the petition with his name and address.

#### GUARDIANS AD LITEM OR NEXT FRIEND.

In any case where, under the terms of a written instrument or otherwise, any minor or person under disability, or any person or persons not ascertained or not in being, may be or may become interested in any estate, real or personal, the court in which is pending any suit, bill, petition, or proceeding of any kind relating to or affecting any such estate, may, on the representation of any party thereto, or of any person interested, appoint a suitable person to appear and act therein as guardian ad litem or next friend of such minor or person or persons under disability or not ascertained or not in being, and a judgment, order or decree in such proceedings, made after such appointment, is conclusive upon all persons for whom such guardian ad litem or next friend was appointed.<sup>2</sup>

The cost of appearance of such guardian ad litem or next friend, including the compensation of his counsel, is to be determined by the court and paid as it may order, either out of the estate or by the plaintiff or petitioner, in which latter case execution may

<sup>1</sup> St. 1890, c. 420.

<sup>2</sup> St. 1896, c. 456, § 1.

issue therefor in the name of the guardian ad litem or next friend.<sup>1</sup>

Nothing herein contained can be construed to affect or impair the power of any court to appoint a guardian ad litem or next friend under any other provision of law.<sup>2</sup>

#### TRIAL LIST.

To give some order to and facilitate the business of the court the court officer in the earlier and busier part of the court day has charge of a blank book called the docket or trial list. In this each person having business in the court that day is required to write his name, together with the name of the person who, or estate which, is the subject matter of the hearing, and the particular business at that time. The parties are called for hearing in the order the names appear on the book.

#### OATHS.

Oaths required in proceedings in probate courts may be administered by the judge or register in or out of court, or by a justice of the peace, and when administered out of court a certificate thereof must be returned and filed or recorded with the proceedings; but the judge may require such oath to be taken before him in open court.<sup>3</sup>

#### EVIDENCE.

The common rules of evidence are binding on the probate court, except where by statute a difference is made.<sup>4</sup>

<sup>1</sup> St. 1896, c. 456, § 2.

<sup>2</sup> St. 1896, c. 456, § 3.

<sup>3</sup> P. S., c. 156, § 30.

<sup>4</sup> See *Eveleth, ex'r, v. Crouch et ux.*,  
15 Mass. 307 (1818).

## INTERROGATORIES.

In proceedings in probate courts the petitioner or the respondent may, at any time after the filing of the petition, file in the register's office interrogatories for the discovery of facts and documents material to the support or defence of the proceeding, to be answered on oath by the adverse party in the same manner and subject to the same restrictions and regulations as are provided by P. S., c. 167, with reference to interrogatories in civil actions.<sup>1</sup>

If a party neglects or refuses to expunge, amend, or answer according to the requisitions of P. S., c. 167, the petition must be dismissed or its prayer granted, or such other order or decree may be entered as the case may require.<sup>2</sup>

## DECREES.

When a probate court exceeds its powers, or acts in a manner prohibited by law, its decrees are absolutely and entirely void and of no effect, and not simply irregular and voidable. They may then be set aside in any collateral proceeding by plea and proof.<sup>3</sup> Parties having the right to avoid such decrees may confirm them.<sup>4</sup>

A judge of probate has no authority to revoke a decree passed by himself, which was made after due

<sup>1</sup> P. S., c. 156, § 33.

<sup>2</sup> P. S., c. 156, § 34.

<sup>3</sup> *Wales v. Willard*, 2 Mass. 120 (1806); *Holyoke v. Haskins*, 9 Pick. 259 (1830); *Hunt v. Hapgood*, 4 Mass. 117 (1808); *Coffin v. Cottle*, 9 Pick. 287 (1830); *Sigourney v. Sibley*, 21 Pick. 101 (1838); *Peters v. Peters*, 8 Cush. 529 (1851); *Sumner v. Parker*, 7 Mass. 79 (1810); *Jenks v. Howland*, 3 Gray 536 (1855).  
*Cutts v. Haskins*, 9 Mass. 543 (1813); See P. S., c. 156, § 4; *Hathaway v. Smith v. Rice*, 11 Mass. 507 (1814); *Clark*, 5 Pick. 490 (1827).  
*Newhall v. Sadler*, 16 Mass. 122 (1819); <sup>4</sup> *White v. Clapp*, 8 Met. 365 (1844);  
*Holyoke v. Haskins*, 5 Pick. 20 (1827); *Jenks v. Howland et al.*, 3 Gray, 536  
*Thayer v. Thayer*, 7 Pick. 209 (1828); (1855).

notice and in a matter within his jurisdiction,<sup>1</sup> except a warrant or commission for the appraisement of an estate, for examining the claims on insolvent estates, for the partition of real estate, or for the assignment of dower or other interest in real estate, which may be revoked by the court for sufficient cause; and the court may thereupon issue a new commission or proceed otherwise as the circumstances of the case requires.<sup>2</sup> The supreme court modifies this position. In *Pierce, g'd'n. v. Prescott*,<sup>3</sup> Justice Colt said in the opinion of the court that, "The probate court without doubt has an extensive power, upon proper application, and upon due notice to all interested, to correct its own errors and mistakes in favor of parties, who, without fault, are injured thereby. When the proceedings are interlocutory, or are still before the court, as where an estate is still unsettled, it might be proper upon application to correct mistakes when it could be done without ultimate prejudice to the rights of parties interested."<sup>4</sup> In *Tucker et ali. v. Fisk*,<sup>5</sup> it was held that the next of kin of an adopting parent, who but for the adoption would be the heir-at-law of the child, could petition the probate court to annul the decree of adoption on the ground of fraud; but that there must be no laches on the part of the petitioners after the discovery of the fraud before bringing the petition.

None of the processes devised to re-examine the decisions of the common-law courts, except appeal,

<sup>1</sup> *Pettee v. Wilmarth*, 5 Allen 144 (1862).

<sup>2</sup> P. S., c. 156, § 26.

<sup>3</sup> *Pierce, g'd'n. v. Prescott*, 128 Mass. 140 (1880).

<sup>4</sup> See *Waters v. Stickney*, 12 Allen 1 (1866); *Cleveland v. Quilty*, 128 Mass. 578 (1880).

<sup>5</sup> *Tucker et ali. v. Fisk*, 154 Mass. 574 (1891).



are applicable to the probate court. Neither writs of error nor *certiorari* will lie.<sup>1</sup>

In any collateral proceeding the decree of a probate court cannot be enquired into unless upon its face it appears that the court had no jurisdiction in the premises.<sup>2</sup>

St. 1889, c. 435, provides that a decree allowing a will or adjudicating the intestacy of the estate of a deceased person in any court in this Commonwealth having jurisdiction thereof shall, after two years from the rendition of such decree, or, if proceedings for a reversal thereof are had, after two years from the establishment of such decree, be final and conclusive in favor of purchasers for value, in good faith, without notice of any adverse claim, of any property, real or personal, from devisees, legatees, heirs, executors, administrators or guardians, and in favor of executors, administrators, trustees and guardians, who have settled their accounts in due form, and have in good faith disposed of the assets of the estate in accordance with law, and also in favor of persons who have in good faith made payments to executors, administrators, trustees or guardians. It is, however, provided that devisees, legatees, heirs and distributees shall, in case of a subsequent decree reversing or qualifying the decree so originally rendered, be liable to a subsequent executor, administrator, or

<sup>1</sup> *Peters v. Peters*, 8 Cush. 529 (1851). *adm'r*, 11 Cush. 107 (1853); *Parker v.*

<sup>2</sup> *Reid v. Borland*, 14 Mass. 208 (1817); *Dublin v. Chadbourn*, 16 Mass. 433 (1820); *Laughton v. Atkins*, 1 Pick. 535 (1822); *Newman v. Jenkins*, 10 Pick. 516 (1830); *Loring v. Steineman*, 1 Met. 204 (1840); *Parcher v. Bussell*, *Parker*, 11 Cush. 519 (1853); *Emery v. Hildreth*, 2 Gray 228 (1854); *Crippen v. Dexter*, 13 Gray 330 (1859); *Boston v. Robbins*, 126 Mass. 384 (1879); *White v. Weatherbee*, 126 Mass. 450 (1879).

other person found entitled thereto, for any proceeds or assets of the estate received by them under the former decree, and in such case proceeds of real estate shall be treated as real estate. It is provided further that nothing contained in this act shall be construed to make an adjudication of the fact of death conclusive to an extent to which it would not otherwise be conclusive.

*Presumption of Regularity of Proceedings.*

When the validity of a decree of a probate court is drawn in question in another suit or proceeding, everything necessary to have been done or proved in order to render the decree valid, which might have been proved by parol evidence at the time of the making of the decree, and was not required to be recorded, shall after twenty years from such time be presumed to have been done or proved, unless the contrary appears on the same record.<sup>1</sup>

When the records are apparently entire, and no loss of papers in the probate office is suggested, it will not be presumed, even after the lapse of more than thirty years, that any decree was made, or that any notice was given, which does not appear.<sup>2</sup>

*Confirmation of Defective Acts or Proceedings.*

When the authority or validity of an act or proceeding of the probate court, or of a person acting as executor, administrator, guardian or trustee, is called in question by reason of an alleged irregularity, defective notice, or want of authority, any party inter-

<sup>1</sup> P. S. c. 156, § 29.

(1827). See *Marcy v. Marcy*, 6 Met.

<sup>2</sup> *Hathaway v. Clark*, 5 Pick. 490

360 (1843).

ested in, or affected by such act or proceeding, may apply to the probate court having jurisdiction of the subject matter in respect to which the act or proceeding has been had, and the court, after such notice as it may order to all parties interested, and to the persons who may be the parents of such parties not in being, with power to appoint a guardian or next friend to represent the interests of any person unborn or unascertained, may hear and determine the matter and confirm the act or proceeding in whole or in part, and may authorize and empower the executor, administrator, guardian or trustee, or any successor, or other person who may be legally appointed to act in the same capacity, to ratify and confirm such act or proceeding, and to execute and deliver such deeds, releases, conveyances, and other instruments as may be found necessary for that purpose; but no act or proceeding can be ratified or confirmed which the court might not have passed or authorized in the first instance upon due proceedings.<sup>1</sup>

#### COSTS.

The general rule is that no costs are allowed in the probate court or in probate appeals in the supreme court.<sup>2</sup> But "costs and expenses" may be allowed in the discretion of the court to either party, to be paid by the other, or to either or both parties, to be paid out of the estate which is the subject of the controversy, as justice and equity may require.<sup>3</sup>

When costs are awarded to be paid by one party to

<sup>1</sup> St. 1888, c. 420. See, also, P. S., c. 142, §§ 22-24.

<sup>3</sup> P. S., c. 156, § 35, amended by St. 1884, c. 131. See *Willard et al. v. Lavender*, 147 Mass. 15 (1888).

<sup>2</sup> *Woodbury v. Obear*, 7 Gray, 467 (1856).

the other, the court may issue execution therefor in like manner as is practised in the courts of common law.<sup>1</sup>

If a person appears and objects to the granting of a license to sell real estate, and it appears to the court that either the petition or the objection thereto is unreasonable, it may award costs to the prevailing party.<sup>2</sup>

The executor named in an instrument which has been approved as a will by the judge of probate is not to be charged with the costs of an appeal, on which it is found that the will was made under his undue influence.<sup>3</sup>

One who has been appointed administrator of the estate of his deceased wife, prior to the discovery of her last will, and under the supposition that no will existed, is not entitled to charge in his account of administration, after her will has been established, the expenses of opposing the probate thereof.<sup>4</sup>

A special administrator by leave of the probate court may pay from the personal estate in his hands the expenses incurred by the executor named in the will of a deceased person in proving the same in the probate court or in sustaining the proof thereof in the supreme court.<sup>5</sup>

The party prevailing in an appeal from the decision of commissioners appointed to receive and examine claims against insolvent estates of deceased persons are entitled to costs, which, if recovered against the

<sup>1</sup> P. S., c. 156, § 36.

<sup>4</sup> *Edwards v. Ela*, 5 Allen, 87

<sup>2</sup> P. S., c. 142, § 10.

(1862).

<sup>3</sup> *Woodbury v. Obear*, 7 Gray, 467

<sup>5</sup> St. 1884, c. 291.

(1856).

executor or administrator, may be allowed to him in his administration account.<sup>1</sup>

#### BLANKS.

The judges of the several courts of probate prepare the blanks for use in their courts, and after being approved by the supreme court or a majority of the justices thereof, take effect and are in force in all courts of probate.<sup>2</sup>

To attorneys and parties doing business in the probate court these blanks are furnished free upon application.

#### TEMPORARY INVESTMENT.

A probate court may, upon application of a person interested in an estate in process of settlement in such court, direct the temporary investment of any money belonging to such estate in securities to be approved by the judge; or may authorize the same to be deposited in any bank or institution in the commonwealth empowered to receive such deposits, upon such interest as such bank or institution may agree to pay.<sup>3</sup>

#### DISPOSITION OF UNCLAIMED MONEYS, ETC.

Whenever the residence of a person named as a legatee under the provisions of a will duly proved in the probate court is unknown, the court may, on being satisfied of said facts, direct that the legacy due to such person be deposited or invested in the manner set forth in P. S., c. 144, § 16, and subject to the provisions thereof.<sup>4</sup>

<sup>1</sup> P. S., 137, § 15.

<sup>3</sup> P. S., c. 156, § 32.

<sup>2</sup> St. 1893, c. 372, § 1.

<sup>4</sup> St. 1885, c. 376.

Whenever a person named as a legatee, under the provisions of a will duly proved in the probate court, is under the age of twenty-one years, and has no legal guardian, the court may, on being satisfied of said fact, direct that the legacy due to such person be deposited or invested in the manner set forth in P. S., c. 144, § 16, and subject to the provisions thereof.<sup>1</sup>

The probate court, upon the application of any person interested or of the attorney-general, and after such public notice as the court may deem proper to be given, must order and decree that all sums of money heretofore or hereafter deposited in a savings bank, institution for savings, or trust company, by authority of the probate court, and which shall have remained unclaimed for a period of more than five years from the date of such deposit, with the increase and proceeds thereof, to be paid to the treasurer of the Commonwealth, to be held and used by him according to law, subject for fifteen years only to be paid with interest at the rate of three per cent. per annum from the time it is so paid to said treasurer to the time it is paid by him to the person or persons having, and established, a lawful right thereto.<sup>2</sup>

The judge of any probate court may, upon the application of any person interested and after such public notice as said court may deem proper, order all sums of money or the proceeds thereof deposited or invested by authority of said court, and which have remained unclaimed for a period of twenty years from the date of such deposit or investment, to

<sup>1</sup> St. 1889, c. 185.

<sup>2</sup> St. 1889, c. 449, § 2.



be paid to the residuary legatee of the person to whose estate the money belonged, if there is such a residuary legatee, or if no such residuary legatee be then living, then to the heirs of such residuary legatee living at the time of such distribution; and if no such residuary legatee or any of his heirs be then living, or if such deceased person died intestate, said money and the proceeds thereof must be disposed of and distributed among the persons entitled thereto; and in the manner provided for by the law for the distribution of personal estate of a deceased person not lawfully disposed of by will; provided, however, that the judge of probate first requires from the person or persons to which such sums shall be ordered to be paid, a sufficient bond of indemnity, with two sufficient sureties to be approved by him, with condition to repay to the person or persons for whose benefit such deposit or investment was originally made, or to the personal representatives of such person or persons, all sums paid over by the order of the judge of probate under these provisions.<sup>1</sup> The judge of probate ordering such distribution may appoint an administrator *de bonis non* for the purpose of carrying out these provisions.<sup>2</sup>

In the counties of Middlesex and Suffolk, whenever a deposit or investment is made in the name of the judge of the probate court, it must be made in the name of the first judge of said court, and is subject to the order of the court.<sup>3</sup>

<sup>1</sup> St. 1890, c. 408, § 1.

<sup>3</sup> St. 1893, c. 379, and St. 1894, c. 527, § 1.

<sup>2</sup> St. 1890, c. 408, § 2.

## RULES.

The judges of the several courts of probate were instructed to confer, and prepare, before Sept. 1, 1893, rules of practice and procedure in their courts, and also blanks for use therein, which rules and blanks were submitted to the supreme court for approval; and were duly approved. The judges of probate may from time to time make new rules and blanks, which new rules and blanks must be approved by the supreme court or a majority of the justices thereof.<sup>1</sup>

Where the rules provide that two days must elapse between the last publication of a notice and the return day, one day is insufficient, even if the court so orders it, and all proceedings based upon such a notice are invalid.<sup>2</sup>

The rules of the probate courts of Massachusetts, as approved by the supreme judicial court May 5, 1894, are as follows:—

*Probate Rules.*

## I.

Any party may appear in the probate court in person, or by an attorney authorized to practise in the courts of this Commonwealth, or by a person authorized by a writing, filed in said court, for that purpose.

Any person appearing for another in the probate court shall enter his appearance in writing, giving his name, place of residence or business, the matter in which, and the name or names of the person or persons for whom, he appears. Such writing shall be filed with the register and the fact entered in the docket.

Each petition shall be considered a separate proceeding, and appearance of an attorney entered accordingly.

<sup>1</sup> St. 1893, c. 372.

<sup>2</sup> *Baker et al. v. Blood*, 128 Mass. 543 (1880).

## II.

If a party shall change his attorney, pending any proceeding, the name of the new attorney shall be substituted on the docket for that of the former attorney, and notice thereof given to the adverse party; and until such notice of the change of an attorney all notices given to or by the attorney first appointed shall be considered in all respects as notice to or from his client, except in cases in which by law the notice is required to be given to the party personally; provided, however, that nothing in these rules shall be construed to prevent any party interested from appearing for himself in the manner provided by law; and in such case the party so appearing shall be subject to the same rules that are or may be provided for attorneys in like cases, so far as the same are applicable.

## III.

When the authority of an attorney-at-law to appear for any party shall be demanded, if the attorney shall declare that he has been duly authorized to appear, by an application made directly to him by such party, or by some person whom he believes to have been authorized to employ him, such declaration shall be deemed and taken to be evidence of authority to appear and prosecute or defend in any action or proceeding.

## IV.

In addition to making appointments of guardians *ad litem* in cases required by statute, whenever it shall appear that a minor is interested in any matter pending, a guardian *ad litem* for such minor may be appointed by the court at its discretion, with or without notice.

## V.

The court will grant commissions to take the depositions of witnesses without the Commonwealth; and any party may, on application to the register, obtain a commission, which shall be directed to any commissioner appointed by the governor of the Commonwealth to take depositions in any other of the United States, or the commission may be directed to any justice of the peace, notary public, or other officer legally empowered to take depositions or affidavits in the State or country where the deposition is to be taken. In each case the depositions shall be taken upon interrogatories to be filed by the party

applying for the commission, and upon such cross-interrogatories as shall be filed by the adverse party; the whole of which interrogatories shall be annexed to the commission. The party applying for the commission shall in each case file his interrogatories in the register's office, and give notice thereof to the adverse party or his attorney seven days at least before taking out the commission, and fourteen days at least before the taking, if the party or his attorney live out of the Commonwealth. But where the adverse party does not appear, such interrogatories need not be exhibited to him, nor notice be given to him of the same. And when a deposition shall be taken and certified by any person as a justice of the peace or other officer as aforesaid, by force of such commission, if it shall be objected that the person so taking and certifying the same was not such officer, the burden of proof shall be on the party so objecting; and, if a like objection shall be made to a deposition taken without such commission, it shall be incumbent on the party producing the deposition to prove that it was taken and certified by a person duly authorized.

## VI.

In all cases where depositions shall be taken on interrogatories no party shall be permitted to attend at the taking of such deposition, either himself, or by an attorney or agent; nor be permitted to communicate by interrogatories or suggestions with the deponent while giving his deposition. It shall be the duty of the commissioner to take such deposition in a place separate and apart from all other persons, and to permit no person to be present during such examination except the deponent and himself, and such disinterested person, if any, as he may think fit to appoint as a clerk to assist him in reducing the deposition to writing. And it shall be the duty of the commissioner to put the several interrogatories and cross-interrogatories to the deponent in their order, and to take the answer of the deponent to each, fully and clearly, before proceeding to the next; and not to read to the deponent, nor permit the deponent to read, a succeeding interrogatory, until the answer to the preceding has been fully taken down. And it shall be the duty of the register, on issuing a commission, to take a deposition on interrogatories, to insert the substance of this order therein; or to annex this order, or the substance thereof, to the commission, by way of notice and instruction to the commissioner.

## VII.

All depositions shall be opened and filed by the register when received. The deposition shall afterwards be in his custody, subject to the order of the court, as other documents in the case; and if not read on the trial by the party taking it, it may be used by any other party, if he sees fit, he paying the costs of taking the same.

## VIII.

Whenever, in any case, a notice given in accordance with the general forms of procedure or otherwise is held by the judge to be insufficient, he may order such further notice as the case requires.

## IX.

No executor or administrator shall receive any compensation by way of a commission upon the estate by him administered, but shall be allowed his reasonable expenses incurred in the execution of his trust, and such compensation for his services as the court in each case may deem just and reasonable. The account shall contain an itemized statement of the expenses incurred, and shall be accompanied by a statement of the nature of the services rendered and of such other matters as may be necessary to enable the court to determine what compensation is reasonable.

## X.

Probate accounts should be stated in schedules as follows:

1. *Schedule A.* Containing cash items only, beginning with the amount of cash in the inventory or with the cash balance of the previous account, followed by items of every sum of money received, whether from the sale of real or personal estate or otherwise.
2. *Schedule B.* Containing every sum of money paid for any purpose.
3. *Schedule C.* Containing all items of personal estate (other than cash), whether the same were stated in the inventory or subsequently came to the possession or knowledge of the accountant, together with the valuation put upon them by inventory or by the accountant.
4. *Schedule D.* Containing all items of property that have been delivered by order of the court or otherwise, without having been converted into cash.

XI.

Notice upon an account not intended as final will be issued only by direction of the judge.

Every such account, when no notice has been ordered, unless accompanied by the assent in writing of all persons interested, will be filed, the footings of its schedules entered upon the docket, and the consideration of its allowance will be postponed till the hearing upon the final account.

### Equity Rules.

I.

In all suits in equity the petition shall begin after the address by stating the names and known residence of all persons interested, together with any disability of any of them, and then proceed to state fully all facts necessary to be proved to maintain the petitioner's claim. It shall describe all property to be affected thereby, with sufficient accuracy for identification, and contain a special prayer for each form of relief desired, as well as one for general relief. No other allegations, charges or prayers need be included.

[FORM OF PETITION.]

To the Honorable the Judge of the Probate Court in and for the County  
of

Respectfully represents

petitioners		town		county
state	that	bring	this petition against	
respondents		town	county	state

and allege them to be all the parties interested in the matter of said petition, and further represent

## II.

The original process to require the appearance of respondents shall be a citation in the following form:

## COMMONWEALTH OF MASSACHUSETTS.

SS. PROBATE COURT.

To

WHEREAS,

has presented to said Court his petition, praying

You are hereby cited to appear at a Probate Court to be holden at \_\_\_\_\_, in said county of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_ next, at \_\_\_\_\_ o'clock in the forenoon, to show cause, if any you have, against the same.



And said petitioner is ordered to serve this citation by delivering a copy thereof to each of you, who may be found in said Commonwealth, fourteen days, at least, before said Court, or if any of you shall not be so found, either by delivering a copy thereof to you wherever found or by leaving a copy thereof at your usual place of abode, or by mailing a copy thereof to you at your last known post-office address, fourteen days, at least, before said Court; and also, unless it shall be made to appear to the Court by affidavit that you all have had actual notice of the proceeding, by publishing the same once in each week, for three successive weeks, in a newspaper published in , the last publication to be seven days, at least, before said Court.

Witness, , Esquire, Judge of said Court, this day of , in the year one thousand hundred and Register.

I have served the foregoing citation by ss.

A. D. 189 .

Personally appeared the above-named and made oath to the truth of the above return by h subscribed. Before me,

*Justice of the Peace.*

All process shall be made returnable at a statute court day within three months after the date of such process. In any case such further notice shall be given as the court may order.

### III.

No injunction or other proceeding shall be ordered until the petition is filed, unless for good cause shown. No injunction shall issue, except upon a petition which has been sworn to, or upon verification of the material facts by affidavit.

### IV.

The respondent shall answer fully, directly and specifically to every material allegation or statement in the petition.

### V.

The day of appearance shall be the return day of the citation, unless the court shall otherwise order; and if the respondent shall not appear and file his answer, plea, or demurrer within fourteen days thereafter, the petition shall be taken for confessed, and the matter thereof may be decreed accordingly, unless good cause shall appear to the contrary.

### VI.

The respondent may, at any time before the petition is taken

for confessed, or afterwards by leave of the court, demur, plead, or answer to the petition; and he may demur to part, plead to part, and answer as to the residue; but, in any case in which the petition charges fraud or combination, a plea to such part must be accompanied with an answer supporting the plea, and explicitly denying the fraud or combination, and the facts on which the charge is founded.

VII.

The petitioner may set down the plea or demurrer to be argued, or take issue on the plea, within fourteen days from the time when the same is filed; and, if he shall fail to do so, a decree dismissing the petition may be entered upon motion, unless good cause appear to the contrary.

VIII.

If a plea or demurrer be overruled no other plea or demurrer shall be received, but the respondent shall proceed to answer the petition; and, if he shall fail to do so within fourteen days, the petitioner may enter an order that the same, or so much thereof as is covered by the plea or demurrer, be taken for confessed, and the matter thereof may be decreed accordingly, unless good cause shall appear to the contrary.

IX.

The respondent, instead of filing a formal plea or demurrer, may insist on any special matter in his answer, and have the same benefit therefrom as if he had pleaded the same, or demurred to the petition.

X.

The respondent to a cross-petition shall in no case be compelled to answer thereto before the respondent to the original petition shall have answered such original petition.

XI.

The form of the general replication shall be that the plaintiff joins issue on the answer. The petitioner shall file exceptions, or set down the case for hearing within fourteen days after the answer is required to be filed; or, if the answer be filed before it is required, then within fourteen days after written notice of such filing, and, if he fail so to do, a decree may be entered for the dismissal of the petition.

## XII.

If the petitioner shall except to an answer as insufficient he shall file his exceptions, and forthwith give notice thereof to the respondent or his attorney; and, if within fourteen days the respondent shall put in a sufficient answer, the same shall be received; but, if the respondent insist on the sufficiency of his answer, he shall, within fourteen days, file a statement to that effect, and give notice thereof to the petitioner. and thereupon the exceptions shall be set down to be argued. If the answer shall be adjudged insufficient, a new answer shall be filed within fourteen days.

## XIII.

Upon a second answer being judged insufficient, the respondent may be examined upon interrogatories, and committed until he shall answer them.

## XIV.

The court may in its discretion allow the parties to amend their pleadings, and order or permit pleadings to be filed, or any proceedings to be had, at other times than are provided in these rules; and may in all cases impose just and reasonable terms upon the parties.

## XV.

All notices in a case required to be given to a party may be given to his attorney of record; and, if transmitted through the post-office, postpaid, shall be deemed to have been received by the person to whom they are addressed, in due course of mail, unless the contrary shall appear by affidavit or otherwise.

## XVI.

When the death of any party shall be suggested in writing, and entered on the docket, the register, upon application, may issue process to bring into court the representative of such deceased party.

## XVII.

When the circumstances of the case are such as to require a petition of revivor, or supplemental petition, or petition in the nature of either or both, or the joinder of additional or different parties, the requisite allegations may be made by way of

amendment to the original petition; and after service on any new parties, as in the case of an original petition, and service of copies of the amendments on all the respondents affected thereby, shall entitle the petitioner to proceed as on an original petition.

XVIII.

In petitions by executors or trustees to obtain the instructions of the court, and in petitions of interpleader, or in the nature of interpleader, no attorney for the petitioner shall appear or be heard or act for or in behalf of any or either of the respondents.

XIX.

All facts well alleged in a petition, other than for discovery only, which are not denied or put in issue by the answer, shall be deemed to be admitted.

XX.

Testimony taken by depositions shall be taken in the manner required by statute and by the rules of the court in matters of probate.

XXI.

When any matter shall be referred to a master he shall, upon the application of either party, assign a time and place for hearing, which shall be not less than ten days thereafter; and the party obtaining the reference shall serve the adverse party, at least seven days before the time appointed for the hearing, with a summons, requiring his attendance at such time and place, and make proof thereof to the master; and thereupon, if the party summoned shall not appear to show cause to the contrary, the master may proceed *ex parte*; and if the party obtaining the reference shall not appear at the time and place, or show cause why he does not, the master may either proceed *ex parte*, or the party obtaining the reference shall lose the benefit of the same, at the election of the adverse party.

XXII.

When the master has prepared a draft copy of his report he shall notify the parties or their attorneys of a time and place when and where they may attend to hear the same, and suggest such alterations, if any, as they may think proper; upon

consideration whereof, the master will finally settle the draft of his report, and give notice thereof to the parties or their attorneys, whereupon, after examining the same, or being furnished with a copy thereof, if they so request, and pay the usual fees therefor, five days shall be allowed for bringing in written objections thereto, which objections, if any, shall be appended to the report. No exceptions to a master's report will be allowed without a special order of the court, unless founded upon an objection made before the master, and shown by his report, and unless filed with the register within fourteen days from the filing of the report. Notice of the filing of a master's report shall be forthwith sent by the register to each party or his attorney.

## XXIII.

When exceptions shall be taken to the report of a master, they shall be filed with the register, and notice thereof shall forthwith be given to the adverse party; and the exceptions shall then be set down for argument. In every case the exceptions shall briefly and clearly specify the matter excepted to, and the cause thereof; and the exceptions shall not be valid as to any matter not so specified.

## XXIV.

When any party shall desire a hearing in equity, he may apply to the judge to appoint a time and place therefor; and when such time and place shall have been appointed he shall give notice thereof to the adverse party, or his attorney, through the post-office, postpaid; but this rule shall not prevent a party from obtaining a preliminary injunction, or a dissolution of an injunction, or other order, upon a shorter notice, or without notice, if the court shall think the same reasonable. Cases may be heard by consent of parties, and the permission of the court, without such notice.

## XXV.

The attorney of the party in whose favor a decree or order is passed shall draw the same. All pleadings shall be recorded, unless the court shall otherwise order.

[FORM OF DECREE.]

## COMMONWEALTH OF MASSACHUSETTS.

25.

On the petition in equity of \_\_\_\_\_ petitioners,  
against \_\_\_\_\_ respondents, praying  
it appearing that notice according to the order of the Court has been  
given all parties interested \_\_\_\_\_  
person objecting after hearing and consideration, the Court doth order  
and decree,

## XXVI.

Rules I, II and III in probate shall apply to proceedings in equity.

## APPEALS.

The supreme judicial court is the supreme court of probate, and has appellate jurisdiction of all matters determinable by the probate courts and by the judges thereof, except in cases in which other provisions are specially made.<sup>1</sup>

A boy or girl ordered to be committed to the reform or industrial school, under P. S., c. 89, may appeal to the superior court, and the appeal is then entered, tried and determined in like manner and subject to like provisions as appeals from trial justices in criminal cases.<sup>2</sup>

Appeals from the decisions of commissioners to allow claims against the estates of deceased insolvent debtors must be made to the supreme judicial court in the same county if in the county of Suffolk the demand exceeds three thousand dollars, and in any other county one thousand dollars, otherwise to the superior court; and in either case the appeals are tried and determined in like manner as if an action

<sup>1</sup> P. S., c. 156, § 5.

<sup>2</sup> P. S., c 89, § 30.



had been brought therefor by the supposed creditor against the executor or administrator.<sup>1</sup>

All appeals from orders, sentences, decrees or denials of probate courts on petitions brought under P. S., c. 147, § 33, on petitions of married women concerning their separate estates, and on petitions concerning the care, custody, education and maintenance of minor children provided for by P. S., c. 147, §§ 31, 32, and 36, must be taken to the superior court; and all proceedings on such appeals are the same, so far as practicable, as like appeals to the supreme court.<sup>2</sup>

These appeals to the superior court are taken in the same manner as appeals to the supreme court.<sup>3</sup> The superior court must establish rules necessary to regulate this practice.<sup>4</sup>

The supreme court as a court of law exercises jurisdiction on exceptions, report, or otherwise, of questions of law arising in all said matters in the superior court.<sup>5</sup>

### *Effect of Appeal on Decrees.*

After an appeal has been claimed and notice has been given at the registry of probate, all proceedings in pursuance of the decree or order appealed from, except when otherwise expressly provided, are stayed until the determination of the supreme court of probate is had; but if on such appeal such decree or order is affirmed, it is thereafter of full force and validity. If the appellant in writing waives his

<sup>1</sup> P. S., c. 137, § 11.

St. 1888, c. 290, amending P. S., c. 156.

<sup>2</sup> St. 1887, c. 332, § 3.

<sup>4</sup> St. 1887, c. 332, § 6.

<sup>3</sup> St. 1890, c. 261, § 3; i. e., as under

<sup>5</sup> St. 1887, c. 332, § 4.

appeal before the entry thereof, proceedings may be had in the probate court as if no appeal had been taken.<sup>1</sup>

Decrees are vacated only by appeals taken by parties having the right of appeal.<sup>2</sup>

When the decree of a judge of probate, appointing an administrator, is appealed from, the authority of such administrator is thereby suspended, and any further proceedings by him in that capacity are irregular<sup>3</sup> and invalid.<sup>4</sup> A decree or order of a probate court made in proceedings under P. S., c. 147, § 33, has effect, notwithstanding an appeal, until otherwise ordered by the superior court, and said court in any county or any justice thereof may in term time or vacation suspend or modify such decree or order during the pendency of the appeal.<sup>5</sup>

A decree of the probate court or of a single justice of the supreme court of probate removing an executor, administrator, guardian, or trustee, has effect, notwithstanding an appeal from such decree, until otherwise ordered by the supreme court, and the probate court may appoint a successor to the person removed, and the person removed must thereupon deliver all the property held by him or such executor, administrator, guardian, or trustee, to such successor, who shall proceed in the performance of his duties in like manner as if no appeal had been taken; but if the decree of removal is reversed by the supreme court, the powers of such successor thereupon cease, and he must forthwith deliver to his predecessor in

<sup>1</sup> P. S., c. 156, § 12.

<sup>3</sup> *Arnold v. Sabin*, 4 Cush. 46 (1849).

<sup>2</sup> *Cleveland v. Quilty*, 128 Mass. 578 (1880). <sup>4</sup> *Daley v. Francis*, 153 Mass. 8 (1891).

<sup>5</sup> St. 1890, c. 261, § 1.

the trust, or to such person as the court may order, all property of the estate in his hands.<sup>1</sup>

The several probate courts have like power and authority for enforcing the provisions of the preceding section, and all orders and decrees made under the same, and for punishing any contempt of such orders and decrees, as are vested for such purposes in the supreme court sitting in equity in relation to any suit or matter in that court; and any decree of a probate court made in pursuance of the provisions of the preceding section has effect, notwithstanding an appeal therefrom, until otherwise determined by the appellate court.<sup>2</sup>

The supreme court for any county, or a justice thereof, may in term time or vacation, after an appeal has been claimed from an order or decree referred to in the two preceding sections, and before such appeal has been finally determined, suspend or modify such order or decree during the pendency of such appeal.<sup>3</sup>

The supreme court of probate reverse or affirm, in whole or in part, the decree or order appealed from, and may pass such decree thereon as the probate court or the judge thereof ought to have passed, may remit the case for further proceedings, or take any other order therein as law and justice may require.<sup>4</sup>

If an appellant fails to enter and prosecute his appeal, the supreme court of probate may, upon the complaint of any person interested, affirm the former decree or order, or take such other order as law and

<sup>1</sup> P. S., c. 156, § 14.

<sup>2</sup> P. S., c. 156, § 15.

<sup>3</sup> P. S., c. 156, § 16.

<sup>4</sup> P. S., c. 156, § 17; *Dexter et ux. v. Brown*, 3 Mass. 32 (1807).

justice may require, or, if the appellant fails to enter his appeal within the time allowed by law, the probate court from which the appeal was taken may upon petition of any person interested, and upon such notice to the appellant as the court shall order, dismiss the appeal, and affirm the decree or order appealed from ; and further proceedings may then be had in the probate court as if no appeal had been taken.<sup>1</sup>

*Equity Appeals.*—An appeal from any order or decree made under St. 1891, c. 415, § 2, or from any interlocutory order or decree of a probate court, made in the exercise of any jurisdiction vested in it by this act or otherwise, does not suspend or stay proceedings under such order or decree pending the appeal. But the probate court or the supreme court, in case of any such appeal, may by order stay all proceedings under such order or decree pending the appeal, and in case of an appeal from any order, sentence or decree of the probate court, may make such orders as are necessary or proper to protect the rights of persons interested, pending the appeal, and any such order of the probate court for a stay of proceedings, or for protection of any such rights, may be varied or discharged by the supreme court upon motion, and cannot be otherwise subject to an appeal to that court.<sup>2</sup>

*Where Appeal Lies.*

In cases where there is a right of appeal, the matter in controversy should be judicially heard and

<sup>1</sup> P. S. c., 156, § 18.

<sup>2</sup> St. 1891, c. 415, § 3.

considered in the court below, and a *pro forma* judgment should not be entered.<sup>1</sup>

Accounts of administrators and executors must be allowed and settled in the probate court before an appeal will lie.<sup>2</sup>

An appeal lies from a decision of the probate court dismissing a petition to revoke a decree of adoption on the ground of fraud practised on the court.<sup>3</sup>

An appeal from a decree of the probate court refusing letters of administration, unless bonds in a certain amount, and with certain sureties, should be filed, was allowed in a certain case.<sup>4</sup> So, when the court refused further time for creditors of a deceased insolvent to prove their claims before the commissioners, although their report had been made and accepted.<sup>5</sup> So, when the court refused to appoint commissioners on the administrator's representation of insolvency.<sup>6</sup>

An appeal lies to the refusal of the court to allow a petition for a rehearing of a decree to account.<sup>7</sup>

Also, from a decree dismissing a petition for partition.<sup>8</sup>

Also, from a decree refusing to authorize a suit in the name of the judge upon an administration bond;<sup>9</sup> but not from a decree authorizing such a suit.<sup>10</sup>

<sup>1</sup> *Parker v. Parker*, 118 Mass. 110 (1875).

<sup>2</sup> *Cook v. Horton*, 129 Mass. 527 (1880).

<sup>3</sup> *Tucker et al. v. Fisk*, 154 Mass. 574 (1891).

<sup>4</sup> *Picquet's Case*, 5 Pick. 65 (1827).

<sup>5</sup> *Walker v. Lyman*, 6 Pick. 458 (1828).

<sup>6</sup> *Bucknam v. Phelps*, 6 Mass. 448 (1810).

<sup>7</sup> *Davis v. Cowdin*, 20 Pick. 510 (1838).

<sup>8</sup> *Dearborn v. Preston*, 7 Allen 192 (1863).

<sup>9</sup> *Robbins v. Hayward*, 16 Mass. 528 (1820); *Conant, adm'r, v. Kendall et al.*, 21 Pick. 36 (1838).

<sup>10</sup> *Ex parte Jones*, 8 Pick. 121 (1829).

*Who May Appeal.*

Any person aggrieved by an order, sentence, decree, or denial of a probate court or of a judge of such court, may, except in cases otherwise provided for, appeal therefrom to the supreme judicial court.<sup>1</sup>

A person under guardianship as *non compos* may appeal from a refusal to revoke the letters of guardianship.<sup>2</sup>

An appeal from a decree of a judge of probate, allowing the account of an executor, should be made by the executor or administrator of a residuary legatee, and not by one entitled to a distributive share of the estate of such residuary legatee.<sup>3</sup>

A creditor of a deceased person can appeal from the granting of administration on his estate.<sup>4</sup>

The children of a *non compos* can appeal from the allowance of the guardian's account, being heirs presumptive to the estate of the ward.<sup>5</sup>

Where a testator bequeathed his personal property to his wife, and devised a portion of his land to his executor to sell the same and pay his debts and certain legacies out of the proceeds, and after the execution of the will the testator sold the portion of his land so devised and purchased other land, the widow of the testator has the right of appeal from a decree of the probate court refusing to grant her petition that the after-acquired land might be sold for the payment of debts.<sup>6</sup>

<sup>1</sup> P. S., c. 156, § 6.

<sup>4</sup> *Stebbins v. Palmer*, 1 Pick. 71

<sup>2</sup> *McDonald v. Morton*, 1 Mass. 543 (1822).

<sup>5</sup> *Boynton v. Dyer*, 18 Pick. 1 (1836).

<sup>3</sup> *Downing v. Porter*, 9 Mass. 386 (1812).

<sup>6</sup> *Lee, Appellant*, 18 Pick. 285 (1836);  
*Ex parte Kempton*, 23 Pick. 163 (1839).



A creditor of a spendthrift may appeal from the refusal of the court to authorize suit to be brought on his guardian's bond.<sup>1</sup>

An administrator *de bonis non* may appeal from a decree of the judge of probate allowing the administration accounts of the original executor or administrator.<sup>2</sup>

When a testator bequeaths money to trustees, to be managed as an accumulating fund, for the term of sixty years, and then to be paid by them to a certain town, or its duly appointed agents, for the purpose of establishing a model farm, etc., the town is entitled to appeal from a decree of the judge of probate respecting the testator's will.<sup>3</sup>

An administrator, appointed in another state, on the estate of a person there resident and deceased, may appeal from the decree of a judge of probate in this commonwealth, appointing an administrator here.<sup>4</sup>

A purchaser of the reversionary interest in land of a deceased insolvent, assigned to his widow as dower, may appeal from the appointment of an administrator *de bonis non*.<sup>5</sup>

Sureties on the bond of a deceased and insolvent guardian have the right to appeal from the decree of a judge of probate, settling an account of his guardianship, and fixing an amount as due from his estate to the estate of the ward.<sup>6</sup>

<sup>1</sup> *Conant, adm'r, v. Kendall et al.*, 21 Pick. 36 (1838).

<sup>4</sup> *Smith v. Sherman*, 4 Cush. 408 (1849); *Martin v. Gage*, 147 Mass. 204 (1888).

<sup>2</sup> *Wiggin, adm'r, v. Swett*, 6 Met. 194 (1843).

(1888).

<sup>5</sup> *Bancroft v. Andrews*, 6 Cush. 493

<sup>3</sup> *Inhabitants of Northampton et al. v. Smith et al.*, 11 Met. 390 (1846).

(1850).

<sup>6</sup> *Farrar et al. v. Parker et al.*, 3 Allen 556 (1862).

If the due execution of a will is controverted, on appeal from a decree of the judge of probate, devisees named therein have a right to appear as parties to establish it, although an administrator with the will annexed has been appointed and appears for the same purpose.<sup>1</sup>

If there is property of a testator not devised or bequeathed, his heirs or next of kin may appeal from the allowance of the executor's account.<sup>2</sup>

A person entitled to a share of the reversion in a trust fund to be accounted for may appeal from the allowance of the final account of the executor of the will creating the trust.<sup>3</sup>

The widow of a testator has a right of appeal from the allowance of the will of her husband.<sup>4</sup>

### *Who Cannot Appeal.*

The uncle and next friend of a *non compos* cannot, as such, appeal from the allowance of the guardian's account, unless he is a presumptive heir, next of kin, or a creditor.<sup>5</sup>

A mere debtor to the estate of a person deceased cannot appeal from a decree of the probate court granting letters of administration on such estate.<sup>6</sup>

A creditor of an heir at law cannot appeal from the probate of a will which devised the real estate of the deceased, unless he has attached such real estate,

<sup>1</sup> *Eliot v. Eliot*, 10 Allen 357 (1865).

<sup>2</sup> *Smith et al., ex'rs, v. Haynes*, 111 Mass. 346 (1873).

<sup>3</sup> *Pierce, ex'r, v. Gould*, 143 Mass. 234 (1887).

<sup>4</sup> *Dexter, ex'r, v. Codman et al.*, 148 Mass. 421 (1889).

<sup>5</sup> *Penniman v. French, g'd'n*, 2 Mass. 140 (1806). See *Ayer v. Breed*, 110 Mass. 548 (1872).

<sup>6</sup> *Swan v. Picquet*, 3 Pick. 443 (1826.)

at the time of the decree and appeal claimed, in an action against the heir.<sup>1</sup>

Where the widow of the deceased has received the amount of her widow's allowance, she cannot appeal from the decree of the probate court granting it to her.<sup>2</sup>

One claiming property of a deceased person, under a gift *causa mortis*, is not affected by decrees of the probate court, charging the administrator with the property, and ordering it to be distributed among the next of kin; and therefore cannot appeal from such decrees, although he appeared and produced witnesses in that court.<sup>3</sup>

A creditor of a deceased person cannot appeal from a decree refusing the petition of the administrator for leave to sell real estate of the deceased for the payment of debts.<sup>4</sup>

The stepmother of minor children, whose parents are both dead, and whose grandmother has been appointed their guardian by the probate court, is not a person aggrieved by the decree, so as to entitle her to appeal therefrom.<sup>5</sup>

### *Claiming Appeals.*

A petition to a judge of probate to allow an appeal, and a formal decree granting such petition, are not usual in practice, nor requisite to the validity of an appeal.<sup>6</sup>

<sup>1</sup> *Smith v. Bradstreet, ex'r*, 16 Pick. 264 (1834).

<sup>4</sup> *Henry v. Estey*, 13 Gray 336 (1859).

<sup>2</sup> *Hale et al. v. Hale*, 1 Gray 518 (1854).

<sup>5</sup> *Lawless v. Reagan*, 128 Mass. 592 (1880).

<sup>3</sup> *Lewis v. Bolitho*, 6 Gray 137 (1856).

<sup>6</sup> *Boynton v. Dyer*, 18 Pick. 1 (1836).

The claim of appeal must be filed in the registry of probate within thirty days after the date of the decree appealed from;<sup>1</sup> i. e., an appeal from a decree dated June 10 can be claimed as late as July 10.<sup>2</sup>

The fact that an appeal was taken can be proved by the record only.<sup>3</sup> So, as to when the decree appealed from was made.<sup>4</sup>

If the record shows an appeal, a waiver of it cannot be shown by parol.<sup>5</sup>

The claim of appeal is in the following form:—

To the Honorable the Judge of the Probate Court in and for the County of *Essex*:

Represents *John Smith* of *Salem*, in the county of *Essex*, that he is an heir at law of *Thomas Smith*, late of *Danvers*, in the county of *Essex*, farmer, deceased, and is interested in the estate of said deceased; that he is aggrieved by a decree of the probate court, held at *Lawrence*, in said county of *Essex*, on the seventeenth day of *April*, A. D. 1891, whereby said Court admitted to probate a certain instrument purporting to be the last will and testament of the said *Thomas Smith* [or, allowing the account of *Andrew Jones*, administrator of the estate of said *Thomas Smith*, deceased; etc.]. And he hereby gives notice that he claims an appeal from said decree to the *Supreme Judicial Court* [or, *Superior Court*].

Dated this tenth day of *May*, A. D. 1891.

*John Smith.*

Although it seems that no notice is required by statute to authorize a judge of probate to make an allowance to a widow, except in cases where special administration is granted, yet if such allowance has

<sup>1</sup> St. 1888, c. 290, § 1; P. S., c. 137, *Lund v. George*, 1 Allen 403 (1861).  
§ 12.

<sup>4</sup> *Leigh v. Arnold*, 5 Cush. 615 (1850).

<sup>2</sup> *Wheeler v. Bent*, 4 Pick. 167 (1826).

<sup>3</sup> *Wells v. Stevens*, 2 Gray 115 (1854); <sup>5</sup> *Kendall v. Powers*, 4 Met. 553 (1842).

*Moore v. Lyman*, 13 Gray 394 (1859);

been made without notice to the parties interested, the supreme court in its discretion will allow an appeal, after the expiration of thirty days, upon a petition filed.<sup>1</sup>

Such appeal cannot be allowed without due notice to the party adversely interested, nor unless the petition therefor is filed within one year after the passing of the decree or order complained of, except that, if the petitioner was out of the United States at the time of the passing of the decree or order, he may file his petition at any time within three months after his return, and within two years after the act complained of.<sup>2</sup>

In the case of an appeal from the decision of commissioners to receive and examine claims against insolvent estates of deceased persons, which a party interested has failed to duly take by reasons other than his own neglect, a petition to appeal cannot be sustained after two years after the return of the commissioners, nor after four years after the date of the administration bond.<sup>3</sup> The allowance of such an appeal and the judgment thereon does not disturb any distribution ordered before notice of the petition, or of the intention to present the same, has been given in writing at the registry of probate or to the executor or administrator; but any debt thus proved and allowed shall be paid only out of such assets as remain in or come to the hands of the executor or administrator after payment of the sums payable on such prior decree of distribution.<sup>4</sup>

<sup>1</sup> *Wright et al. v. Wright*, 13 Allen 207 (1866). *v. Barker*, 145 Mass. 287 (1887).

<sup>3</sup> P. S., c. 137, § 16.

<sup>2</sup> P. S., c. 156, § 10; *Briggs et al.*

<sup>4</sup> P. S., c. 137, § 17.

If a person aggrieved omits to claim or prosecute his appeal, without default on his part, the supreme court of probate, or superior court in cases where it is provided by law that appeals shall be taken to the superior court, if it appears that justice requires a revision of the case, may on the petition of the party aggrieved, and upon such terms as it deems reasonable, allow an appeal to be entered and prosecuted with the same effect as if it had been done seasonably. Such petition may be entered in the clerk's office at any time, and the order of notice thereon may be made returnable at a rule day.<sup>1</sup>

An heir at law, who has notice of an appeal taken by another heir at law from the probate of a will, and takes no steps towards prosecuting that appeal, cannot, after the expiration of thirty days, though within a year, from the decree, and after it has been affirmed by the supreme court by consent of the first appellant, obtain leave to make a new appeal.<sup>2</sup>

An appeal from the allowance or disallowance of a claim by commissioners appointed to examine claims against insolvent estates of deceased persons must be claimed and notice thereof given at the registry of probate within thirty days after the return of the commissioners, or when the court itself receives and examines the claims, within thirty days after the allowance or rejection of the claim.<sup>3</sup>

Where an appeal has been duly taken and entered, and the supreme court erroneously decides that it could not entertain such an appeal, it may afterward,

<sup>1</sup> St. 1890, c. 261, § 2.

decree of affirmance set aside.

<sup>2</sup> *Kent v. Dunham et al.*, 14 Gray 279 (1859). Neither can he have the

<sup>3</sup> P. S., c. 137, § 12.



upon petition therefor, allow the appeal to be again claimed and entered.<sup>1</sup>

The following is a form of a petition for leave to claim and enter an appeal not seasonably claimed:—

To the Honorable the Justices of the *Supreme Judicial Court*  
[or, *Superior Court*]:

Respectfully represents *John Smith*, of *Salem*, in the county of *Essex*, that he is an heir at law of *Thomas Smith*, late of said *Salem*, deceased, and is interested in the estate of said deceased; that he is aggrieved by a decree of the probate court holden at *Lawrence*, in said county, *within one year last past, to wit*, [or, *within two years last past*, if the petitioner was without the United States when the decree was made<sup>2</sup>], on the *seventeenth* day of *April*, A. D. 1891, *admitting to probate a certain instrument purporting to be the last will and testament of the said Thomas Smith, copies of which instrument and of said decree are hereto annexed; that your petitioner did not know of the said proceeding until more than thirty days had passed after the date of said decree* [or, if the petitioner was without the United States at the time of passing the decree, *that at the time of passing said decree your petitioner was without the United States, and has been without the United States until within the three months last past;*<sup>2</sup> etc.]; that his omission to claim an appeal from said decree, and to give notice thereof at the probate office, was without fault on his part. Your petitioner further represents that the said *Thomas Smith*, at the time when he executed said instrument, was not of sound mind [or, *was unduly influenced; or, said instrument was not duly executed;* etc.], and that justice requires a revision of the case. He therefore prays that he may be allowed to enter and prosecute an appeal from said decree of the probate court.

Dated this *seventeenth* day of *September*, A. D. 1891.

*John Smith.*

<sup>1</sup> *Cross v. Cross et al.*, adm'rs, 7 Met. 211 (1843).      <sup>2</sup> See also page 56.

Upon a petition of this kind the petitioner must prove to the court that his case is more than a debatable one, and such as might fairly be submitted to a jury if the appeal had been duly entered.<sup>1</sup>

### *Entering Appeals.*

Appeals must be entered in the supreme court within thirty days after the act appealed from. A copy of the notice of appeal and of so much of the record of the probate court as relates to the appeal must be filed in the supreme court upon the entry of the appeal, or as soon as may be thereafter.<sup>2</sup>

Notice of the entry of the appeal must be given to all parties adversely interested that have entered appearances in the probate court, and it is sufficient to serve the notice in the manner provided by the rules of court for the service of notices, but the court may order such further notice to be given as it may think fit.<sup>3</sup>

A person appealing from decrees settling different accounts of an executor, administrator, guardian, or trustee, may unite his appeals in one notice of appeal and enter the same as one appeal in the supreme court; and if an appeal is taken by any other person from any of the same decrees, or from a decree made at the same time or previously, and settling any other account of such executor, administrator, guardian, or trustee, such appeal may be entered in the supreme court as part of the matter comprised in the appeal previously entered. The court may deal with such different accounts upon appeal as if they formed one

<sup>1</sup> *Capen et al. v. Skinner et al.*, 139 Mass. 190 (1885).

<sup>2</sup> St. 1888, c. 290, § 1.

<sup>3</sup> St. 1888, c. 290, § 2.

continuous account, and may give effect to any alterations that it may make in any account by altering the balance of the last account without altering the balance of any previous account.<sup>1</sup>

The supreme court may by order at any time, in its discretion and upon such terms, if any, as it shall think fit, consolidate any separate appeals from the probate court, and may thereafter deal with such consolidated appeals together or as justice may require.<sup>2</sup>

Appeals and petitions for appeal must be entered on the same docket with cases in equity, and shall have the same rights as to hearing and determination as such cases.<sup>3</sup>

An appeal from the decision of commissioners upon the estate of a deceased insolvent, disallowing the claim of a creditor, may be filed within thirty days after the final return of the warrant upon an extension of the time for proof of claims, although the appealing creditor's claim was disallowed before the first return of the warrant.<sup>4</sup>

The late entry of a probate appeal in the appellate court, with the appellee's written consent, within the time in which an entry is authorized to be made on petition and notice, as provided by P. S., c. 156, § 18, confers the same jurisdiction as if it had been seasonably entered.<sup>5</sup>

Under P. S., c. 156, § 9, an appeal entered on petition must be entered at the term at which leave is granted.<sup>6</sup>

<sup>1</sup> St. 1888, c. 290, § 4.

<sup>5</sup> *Daley v. Francis*, 153 Mass. 8

<sup>2</sup> St. 1888, c. 290, § 5.

(1891).

<sup>3</sup> P. S., c. 156, § 11.

<sup>6</sup> *Robinson v. Durfee*, 7 Allen 242

<sup>4</sup> *Merriam v. Leonard*, 6 Cush. 151 (1863).

(1850).

*Appeals From a Single Justice of the Supreme Judicial Court to the Full Court.*

An appeal lies to the full court from any order or decree of a single justice in an equity or probate cause, in matter of fact as well as of law.<sup>1</sup>

On questions of fact, the decision of the single justice will not be reversed on appeal, unless it is clearly shown to have been erroneous.<sup>2</sup> The justice may reserve, in the exercise of his discretion, for the determination of the whole court, the question of the sufficiency of the evidence to support a decree.<sup>3</sup> Where a question of fact is so reserved, the evidence may be stated by the judge, either in his decree, or in an accompanying report.<sup>4</sup>

But a party to a probate appeal cannot, as a matter of right, require the judge to report the evidence.<sup>4</sup>

Questions of law arising on the trial of a probate appeal before one of the judges of the supreme court, may be brought before the full court upon the report of the justice (in case he shall, in the exercise of his discretion, think fit to report the same) or upon exceptions filed.<sup>4</sup>

A probate appeal may be taken from the final decree of a single justice to the full court at any time within thirty days; but if it is taken before the expiration of thirty days, the full court has cognizance of it in ten days after it is taken.<sup>5</sup>

If an appeal is taken from the decree of the pro-

<sup>1</sup> *Wright et al. v. Wright*, 13 Allen 207 (1866); *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45 (1869). <sup>3</sup> *Higbee et al. v. Bacon*, 11 Pick. 423 (1831); *Stearns v. Fiske*, 18 Pick. 24 (1836).

<sup>4</sup> *Higbee et al. v. Bacon*, 11 Pick. 423 (1831).

<sup>2</sup> *Slack, adm'r, v. Slack*, 123 Mass. 443 (1877); *Sheffield et al. v. Parker et al., ex'rs*, 158 Mass. 330 (1893). <sup>5</sup> *Mason v. Lewis*, 115 Mass. 334 (1874).

bate court on matters of fact, and at a hearing before a single justice of the supreme court the appellant does not appear and is defaulted, and the decree affirmed, and he thereupon appeals to the full court, no evidence having been taken before the single justice, and no report made of the hearing before him, his decree cannot be revised in matter of fact.<sup>1</sup>

On an appeal from the decree of a single justice to the full court in a case in equity or probate, the supreme court cannot order evidence to be taken when none was taken and reported before the single justice.<sup>1</sup>

### *Trial.*

If, upon the hearing of an appeal in the supreme court of probate, a question of fact occurs proper for trial by jury, the court may cause it to be so tried upon an issue formed for the purpose under the direction of the court.<sup>2</sup>

In the matter of framing issues, proceedings in probate appeals are conducted in accordance with the rules and practice in equity. The findings of the jury are availed of to inform the court in matters of controverted facts, which may become material in settling the final decree. They may be disregarded in whole or in part, if on the final hearing they are not deemed important, or new issues may be framed from time to time and submitted, if the rights of the parties seem to require it.<sup>3</sup>

An appeal lies from an interlocutory order refusing to submit issues requested, and if it is apparent that

<sup>1</sup> *Mason v. Lewis*, 115 Mass. 334 (1874).

<sup>2</sup> P. S., c. 156, § 19.

<sup>3</sup> *Newell v. Horner et al.*, 120 Mass. 277 (1876).

the matter ought to be first determined by the full court, a stay of proceedings may be had for that purpose.<sup>1</sup> Exceptions do not lie in such a case.<sup>2</sup>

The court may in its discretion frame issues of fact to be tried by a jury, in an equity cause, when requested by a party, and direct the same to be tried at the bar of the supreme court, or the superior court, in the county where such cause is pending, or at the request of all parties in any other county in which said courts or a single justice thereof may sit.<sup>3</sup>

If the regular term for such trial does not fall within three months from the making up of such issue, a jury may be specially summoned as provided in equity cases by P. S., c. 151, § 28.<sup>4</sup>

Probate appeals in the counties of Berkshire, Franklin, Hampden and Hampshire, may be heard and determined at Springfield at the same times and in the same manner as is provided by P. S., c. 151, § 31, relative to the hearing and determination of equity cases in said counties ; and at any time after the rule day at which a probate appeal is entered in the supreme court for either of said counties, such appeal shall be deemed ready for a hearing, and may be heard before the justice holding session at Springfield, unless there is an order for a jury.<sup>5</sup>

In a hearing on a probate appeal before a single justice no exception lies to his refusal of the request of a party for the appointment of some person to take

<sup>1</sup> *Newell v. Horner et ali.*, 120 Mass. 277 (1876); *Davis et ali. v. Davis, ex'x*, 123 Mass. 590 (1878).

<sup>2</sup> *Davis et ali. v. Davis, ex'x*, 123 Mass. 590 (1878).

<sup>3</sup> St. 1895, c. 116; *Fiske v. Pratt et ali.*, 157 Mass. 83 (1892); *Doherty v. O'Callaghan*, 157 Mass., 90 (1892).

<sup>4</sup> P. S., c. 156 § 20.

<sup>5</sup> P. S., c. 156, § 21.



the evidence of witnesses to be examined orally, if he reports to the full court such evidence himself.<sup>1</sup>

Upon the entry of an appeal from the allowance or disallowance of a supposed claim by the commissioners appointed to receive and examine claims against an insolvent estate of a deceased person, the supposed creditor must file a statement in writing of his claim, setting forth briefly and distinctly all the material facts which would be necessary in a declaration for the same cause of action ; and like proceedings are thereupon had in the pleadings, trial, and determination of the cause, as in an action at law prosecuted in the usual manner, except that no execution can be awarded against the executor or administrator for a debt found due to the claimant. The appellate court has the same power as the probate court or the commissioners to examine the claimant, and the final judgment is conclusive, and the list of debts allowed must be altered, if necessary, to conform thereto.<sup>2</sup>

After claiming an appeal in such a case, the parties may waive a trial at law and submit the claim to the determination of arbitrators to be agreed on between them and appointed accordingly by a rule of the probate court, in which case the appeal must not be entered at the court appealed to ; and the award of such arbitration, if accepted by the court, is conclusive in like manner as is provided in the preceding paragraph with regard to a judgment in a court of common law.<sup>3</sup>

<sup>1</sup> *Granger et alii., ex'rs, v. Bassett*, 98 Mass. 462 (1868).

<sup>2</sup> P. S., c. 137, § 13.

<sup>3</sup> P. S., c. 137, § 14.

*What is Open on Appeal.*

It is not competent for the supreme court, upon an appeal from the probate court, to exercise its general equity powers, but it is bound to make such a decree as the probate court should have made.<sup>1</sup>

It is within the authority of the supreme court, at the hearing upon an appeal from a decree of the probate court allowing the account of a guardian, to inquire into the propriety of an investment objected to by the appellant, and, upon being satisfied that it has been negligently and improvidently made, and that the subject matter of it was of less value than as stated in the schedule annexed to the account, to charge the guardian with the full amount thereof in money.<sup>2</sup>

On an appeal, by one only of persons interested in real estate, from a decree of the probate court granting a license to sell it, the question of title, except so far as any doubt regarding it may affect the expediency of the sale, is not properly before the court, and, if there is no waiver of the objection, cannot be determined.<sup>3</sup>

Items of later date than a probate account are not to be brought before the supreme court on appeal from the allowance of the account.<sup>4</sup>

Where the probate court disallowed in a guardian's account items of advances by him from his own money, and charged him with interest thereon to offset interest computed with monthly rests included in such

<sup>1</sup> *Grinnell v. Baxter*, 17 Pick. 383 (1835).

<sup>3</sup> *Walker, adm'r, v. Fuller*, 147 Mass. 489 (1888).

<sup>2</sup> *Kimball, g'd'n, v. Perkins, adm'r*, 130 Mass. 141 (1881).

<sup>4</sup> *May v. Skinner et al.*, 152 Mass. 328 (1890).

items, and on appeal a master reported that the counter charge of interest would depend upon the allowance of items, leaving open the question of amount. the supreme court allowed certain items that had been disallowed, and held that it was then too late to question the allowance of interest on the items finally allowed, and the propriety of the guardian's using his own money instead of the ward's.<sup>1</sup>

For other cases, showing what questions are open on appeals, see *Willey et al. v. Thompson, ex'r*,<sup>2</sup> and *Sheffield et al. v. Parker et al., ex'rs*.<sup>3</sup>

If the record, when an appeal is taken from a decree of a justice of the supreme court, affirming a decree of the probate court, states a fact essential to the jurisdiction of the probate court, the appellant cannot contend in the supreme court that the fact is otherwise, and move to dismiss the proceeding in the probate court.<sup>4</sup>

### *Waiver of Appeal.*

When an appeal in a probate matter from the final decree of a single justice of the supreme court is pending before the full court, it will, upon a waiver of the appeal, affirm such decree.<sup>5</sup>

The following is the ordinary form of a waiver of appeal in the probate court:—

To the Honorable the Judge of the Probate Court in and for the County of *Essex*:—

Respectfully represents *John Smith* of *Salem*, in said county of *Essex*, that he is *an heir at law of Thomas Smith, late of said*

<sup>1</sup> *May v. Skinner*, 152 Mass. 328 (1890). *ex'rs*, 158 Mass. 330 (1893).

<sup>2</sup> *Willey et al. v. Thompson, ex'r*, 9 Met. 329 (1845). <sup>4</sup> *Robinson v. Robinson*, 129 Mass. 539 (1880).

<sup>3</sup> *Sheffield et al. v. Parker et al.*, <sup>5</sup> *Gray v. Gray*, 150 Mass. 56 (1889).

*Salem, deceased; that on the tenth day of September, A. D. 1892, he gave notice at the probate office of his appeal from a decree of the probate court, holden at Lawrence, on the twentieth day of August, A. D. 1892, admitting to probate a certain instrument, purporting to be the last will and testament of said Thomas Smith, deceased [or, allowing an account of the executor of, etc.]; that he hereby waives his said appeal, and consents that further proceedings may be had in the probate court, in the matter of said will, as if said appeal had not been taken.*

Dated at Salem, this *fifteenth* day of *September*, A. D. 1892.

*John Smith.*

### *Complaint for Affirmation of Decree.*

Where an appellant from the probate court enters his appeal, and afterwards becomes nonsuit, the adverse party, if he would have the benefit of the decree of the court below, must file a complaint for affirmation of the decree and costs. A motion is insufficient.<sup>1</sup>

This is, also, true when the appellant fails to enter his appeal.

The form of such a complaint is as follows:—

To the Honorable the Justices of the Supreme Judicial Court:

*Henry Jones of Salem, in the county of Essex, complains that at a probate court holden at Lawrence, in and for said county, on the sixteenth day of March, A. D. 1896, the last will and testament of Thomas Smith, late of said Salem, deceased, was duly admitted to probate by a decree of said court [or, allowed the account of the administrator, etc.; etc.], as fully appears from the copy of the record filed herewith, from which decree one John Smith, of said Salem, appealed to this court; that said John Smith has failed to enter and prosecute his said appeal [or, has become nonsuit]; that your petitioner is the execu-*

<sup>1</sup> *How v. How*, 5 Mass. 375 (1809).

*tor named in said will [or, is made a legatee in and by said will; etc.], and is interested in the probate thereof. Wherefore your complainant prays that said decree of the probate court may be affirmed, with costs.*

Dated this *second* day of *January*, A. D. 1897.

*Henry Jones.*

With the complaint must also be filed in the court appealed to copies of all the papers in the case, including the decree appealed from, attested by the register of probate, if they have not been already filed.

#### ANNUITY AND DOWER TABLE.

The following is a table showing the value of a life, and of a dower interest at 4 and 6 per cent., in an estate of \$1000, according to the "Actuaries" or "Combined Experience" table of mortality; based on the original computations of Jenkin Jones, and carefully revised for this work.

The left-hand half of the table gives the figures required in finding the values of life interests under chapter 425 of the Acts of 1891, known as the Collateral Succession Law.

The calculation is generally made on the six per cent. basis. The dower table, of course, is just one-third of the whole life interest. To find the present worth of a life or dower interest multiply the amount given in the table by the number of thousands of dollars and fractional parts of a thousand there are in the estate. The amount to be taken is that given opposite the age of the person whose dower or life interest is to be reckoned at the time such

interest accrues. Thus, if a widow is twenty-five years of age at the decease of her husband, and he leaves real estate worth ten thousand dollars, multiply \$271.52 by ten. The result will be the present value of her dower interest in such real estate.

Age.	Value of full Life Interest.		Value of Dower.		Age.
	4 per cent.	6 per cent.	4 per cent.	6 per cent.	
15	\$759.92	\$848.94	\$253.31	\$282.98	15
16	755.84	846.12	251.95	282.04	16
17	751.60	843.24	250.53	281.08	17
18	747.24	840.18	249.08	280.06	18
19	742.68	837.00	247.56	279.00	19
20	738.04	833.64	246.01	277.88	20
21	733.16	830.16	244.39	276.72	21
22	728.16	826.50	242.72	275.50	22
23	723.00	822.72	241.00	274.24	23
24	717.64	818.70	239.21	272.90	24
25	712.12	814.56	237.37	271.52	25
26	706.40	810.18	235.47	270.06	26
27	700.48	805.62	233.49	268.54	27
28	694.40	800.82	231.47	266.94	28
29	688.08	795.84	229.36	265.28	29
30	681.60	790.62	227.20	263.54	30
31	674.88	785.22	224.96	261.74	31
32	667.92	779.52	222.64	259.84	32
33	660.80	773.58	220.27	257.86	33
34	653.40	767.34	217.80	255.78	34
35	645.76	760.86	215.25	253.62	35
36	637.92	754.08	212.64	251.36	36
37	629.76	747.00	209.92	249.00	37
38	621.36	739.56	207.12	246.52	38
39	612.68	731.76	204.23	243.92	39
40	603.72	723.60	201.24	241.20	40
41	594.44	715.08	198.15	238.36	41
42	584.84	706.08	194.95	235.36	42
43	574.96	696.72	191.65	232.24	43
44	564.76	686.88	188.25	228.96	44
45	554.28	676.69	184.76	225.58	45
46	543.60	666.24	181.20	222.08	46
47	532.68	654.38	177.56	218.46	47
48	521.56	644.22	173.85	214.74	48
49	510.28	632.76	170.09	210.92	49
50	498.80	620.94	166.27	206.98	50
51	487.16	608.88	162.39	202.96	51



Age.	Value of full Life Interest.		Value of Dower.		Age.
	4 per cent.	6 per cent.	4 per cent.	6 per cent.	
52	\$475.36	\$596.52	\$158.45	\$198.84	52
53	463.40	583.86	154.47	194.62	53
54	451.32	570.90	150.44	190.30	54
55	439.12	557.70	146.37	185.90	55
56	426.80	544.26	142.27	181.42	56
57	414.36	530.58	138.12	176.86	57
58	401.84	516.66	133.95	172.22	58
59	389.24	502.50	129.75	167.50	59
60	376.60	488.16	125.53	162.72	60
61	363.92	473.58	121.31	157.86	61
62	351.20	458.94	117.07	152.98	62
63	338.56	444.18	112.85	148.06	63
64	325.96	427.36	108.65	143.12	64
65	313.40	414.48	104.47	138.16	65
66	301.00	399.60	100.33	133.20	66
67	288.68	384.78	96.23	128.26	67
68	276.52	370.02	92.17	123.34	68
69	264.52	355.32	88.17	118.44	69
70	252.68	340.68	84.23	113.56	70
71	241.04	326.22	80.35	108.74	71
72	229.60	311.88	76.53	103.96	72
73	218.36	297.72	72.79	99.24	73
74	207.36	283.74	69.12	94.58	74
75	196.60	269.94	65.53	89.98	75
76	186.04	256.38	62.01	85.46	76
77	175.76	243.00	58.59	81.00	77
78	165.72	229.92	55.24	76.64	78
79	155.96	217.08	51.99	72.36	79
80	146.44	204.54	48.81	68.18	80
81	137.16	192.24	45.72	64.08	81
82	128.12	180.12	42.71	60.04	82
83	119.20	168.18	39.73	56.06	83
84	110.44	156.30	36.81	52.10	84
85	101.76	144.48	33.92	48.16	85
86	93.12	132.60	31.04	44.20	86
87	84.56	120.78	28.19	40.26	87
88	76.04	109.02	25.35	36.34	88
89	67.64	97.26	22.55	32.42	89
90	59.40	85.68	19.80	28.56	90
91	51.36	74.28	17.12	24.76	91
92	43.60	63.24	14.53	21.08	92
93	36.24	52.74	12.08	17.58	93
94	29.48	42.96	9.83	14.32	94
95	23.36	34.14	7.79	11.38	95
96	18.48	27.00	6.16	9.00	96
97	14.68	21.54	4.89	7.18	97
98	9.60	14.16	3.20	4.72	98

## CHAPTER II.

### ADMINISTRATION ON INTESTATE ESTATES.

A petition is the foundation of every proceeding in the probate court. This has to be in writing and filed in the court.

When a person dies<sup>1</sup> intestate, no matter how young nor how old, nor how much his estate amounts to, any person interested can petition the probate court for the appointment of an administrator to settle the estate. The right of persons to administer is in the following order:—

*First.* The widow of the deceased or his next of kin, or the widow jointly with the next of kin, as the probate court may deem fit. The right of the widow is not superior to that of the next of kin.

*Second.* If the deceased was a married woman, administration on her estate must in all cases be granted to her husband, if he is competent and willing to undertake the trust, unless the deceased has made some testamentary or other disposition of her estate which renders it necessary or proper to appoint some other person.

*Third.* If all said persons are incompetent or evidently unsuitable for the discharge of the trust,

<sup>1</sup>The person whose estate is the subject matter of the proceeding must be dead before the court, or an administrator appointed by it, can act upon it, under the general law. *Jochumsen v. Suffolk Savings Bank*, 3 Allen 87 (1861).

if they renounce the administration,<sup>1</sup> or if, without sufficient cause and after having been cited by the court for the purpose, they neglect for thirty days<sup>2</sup> after the death of the intestate to take administration of his estate, such administration must be granted to one or more of the principal creditors.<sup>3</sup>

*Fourth.* If there is no such creditor willing and competent to undertake the trust, administration may be granted to such person as the court may deem fit.

*Fifth.* If there is no widow, husband, or next of kin, within the commonwealth, administration must be granted to a public administrator in preference to creditors.<sup>4</sup>

If any one of these several classes of persons is unsuitable for the discharge of the duties of such administration, he is not entitled to it.<sup>5</sup> So, in case of administration with will annexed.<sup>6</sup>

The widow and next of kin are not entitled as of right to be appointed administrator *de bonis non*, as in case of original administration.<sup>7</sup>

Administration of the estate of an intestate may be granted to one or more of his next of kin, or any suitable person, when the widow of the deceased and all his next of kin resident in the commonwealth, who are of full age and legal capacity, consent in writing thereto. And the notice required by law

<sup>1</sup> Such renunciation must appear of record. *Arnold v. Sabin*, 1 Cush. 525 (1848). A simple declination in writing is all that is necessary.

<sup>2</sup> They must be cited even though the thirty days have expired. *Arnold v. Sabin*, 1 Cush. 525 (1848).

<sup>3</sup> If the creditor's cause of action

survives. *Stebbins v. Palmer*, Pick. 71 (1822); *Smith v. Sherman*, 4 Cush. 408 (1849).

<sup>4</sup> P. S., c. 130, § 1.

<sup>5</sup> *Stearns v. Fiske*, 18 Pick. 24 (1836).

<sup>6</sup> *Stebbins v. Lathrop*, 4 Pick. 33 (1826).

<sup>7</sup> *Russell v. Hoar*, 3 Met. 187 (1841).

may be dispensed with as if all parties entitled thereto had signified their assent or waived notice.<sup>1</sup>

When administration has not been taken on the estate of a testator or intestate within twenty years after his decease, or when any property or claim or right thereto remains undistributed or thereafter accrues to such estate and remains to be administered, the probate court may for good cause shown grant original administration on such property, but such administration can affect no other property.<sup>2</sup>

If, after the granting of letters of administration as upon an intestate estate, a will of the person deceased is duly proved and allowed, such letters will be revoked; and the executor or an administrator with the will annexed may demand, collect, and sue for all the personal estate of the deceased which remains unadministered.<sup>3</sup>

#### APPOINTMENT.

The petition for the appointment of an administrator must be brought in the probate court for the county in which the deceased last dwelt. An administrator may be the resident of any state. A married woman may be an administratrix without any act or assent of her husband.<sup>4</sup>

#### *Petition.*

To the Honorable the Judge of the Probate Court in and for the County of *Essex*:

Respectfully represents *John Smith* of *Salem*, in the county of *Essex*, that *Thomas Jones*, who last dwelt in *Salem*, in said

<sup>1</sup> St. 1885, c. 260, amended by St. *ing*, 130 Mass. 83 (1881).  
1890, c. 265.

<sup>3</sup> P. S., c. 130, § 5.

<sup>2</sup> St. 1889, c. 192. See P. S., c. 130.

<sup>4</sup> P. S., c. 147, § 5.

§ 9; c. 137, § 26; *Parsons v. Spauld-*

county of *Essex*, *mason*<sup>1</sup> [or, *widow*, or, *wife of John Jones*<sup>2</sup>], died on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-one*, intestate, possessed of goods and estate\* remaining to be administered, leaving as<sup>3</sup> *widow* [or, *husband*], *his* [or, *her*] only heirs-at-law and next of kin the persons whose names, residences and relationship to the deceased are as follows, viz.:

NAME.	RESIDENCE.	RELATIONSHIP.
<i>Mary Smith,</i>	<i>Salem, Mass.,</i>	<i>widow,</i>
<i>John Smith,</i>	“ “	<i>husband,</i>
<i>John Smith,</i>	<i>Portland, Me.,</i>	<i>father,</i>
<i>Sarah Smith,</i>	<i>New York, N. Y.,</i>	<i>mother,</i>
<i>Henry Allen,</i>	<i>Washington, D. C.,</i>	<i>son,</i>
<i>Sarah Anderson,</i>	“ “	<i>daughter,</i>
<i>Anne Sawyer, wife of Thomas,</i> <sup>4</sup>	<i>Boston, Mass.,</i>	“
<i>Thomas Johnson,</i>	<i>Andover, Mass.,</i>	<i>nephew,</i>
<i>Julia A. Brown,</i>	“ “	<i>niece,</i>
<i>Susan J. Cook,</i>	“ “	<i>aunt,</i>
<i>Maria Ames,</i>	“ “	<i>cousin,</i>
<i>Andrew Bixby,</i>	“ “	<i>uncle,</i>
<i>George Andrews,</i>	“ “	<i>brother,</i>
<i>Harriet Leonard,</i>	“ “	<i>sister,</i>
<i>William Smith,</i>	“ “	<i>son, a minor,</i>
<i>having no guardian.</i>		
<i>Horace J. Smith,</i>	<i>Boston, Mass.,</i>	<i>son, a minor,</i>
<i>John Jones, of Salem, Mass., guardian;</i> <sup>5</sup>		

that your petitioner is *the widow of the deceased* [or, *the husband*; or, *the eldest son*; or, *the father*; or, *the mother*; or, *a child*;

<sup>1</sup> Give the occupation of the deceased, if any, here. If the deceased was a singlewoman, so state here.

<sup>2</sup> If the deceased is a married woman give the husband's name.

<sup>3</sup> If the deceased was unmarried cross out the word “*as*” and write in “*no*,” crossing out the word

“*widow*” or “*husband*” according to the fact.

<sup>4</sup> If the heir is a married woman give the name of the husband.

<sup>5</sup> This list shows the manner of writing in the names, etc., of the heirs at law and next of kin of the deceased.

or, *an heir*; or, *the principal creditor*; or, *a creditor*; or, *requested by the heirs, etc., to administer on the estate of said deceased*; as the case may be].

Wherefore your petitioner prays that he [or, *she*], or some other suitable person, be appointed administrator [or, *-rix*] of the estate of said deceased, and certifies that the statements herein contained are true to the best of his [or, *her*] knowledge and belief.

[If the administrator desires to give a bond without sureties, the preceding clause should read as follows:—

Wherefore your petitioner prays that he [or, *she*] may be appointed administrator [or, *-rix*] of the estate of said deceased, without giving a surety on his [or, *her*] bond, and certifies that the statements herein contained are true to the best of his [or, *her*] knowledge and belief.<sup>1</sup>

Dated this *seventh* day of *March*, A. D. 1891.

*John Smith.*<sup>1</sup>

*Essex, ss.* Subscribed and sworn to this *seventh* day of *March*, A. D. 1891. Before me,

*Nathaniel A. Gore*, Justice of the Peace.

[The petition may be signed by attorney, but must be sworn to by the petitioner.<sup>2</sup>]

The undersigned, being all the persons interested residing in the Commonwealth, who are of full age and legal capacity, hereby assent to the foregoing petition.<sup>3</sup>

[If the administrator wishes to give bond without sureties, instead of the above assent the following form must be used:—

The undersigned, being all the persons interested in the estate, who are of full age and legal capacity, other than credi-

<sup>1</sup> A separate blank petition for that wives of parties in interest appointment, giving bond without need assent. It is the opinion of the sureties, is furnished by the court. writer that they are parties in interest as well as the husbands, and that

<sup>2</sup> St. 1891, c. 414.

<sup>3</sup> Husbands of heirs and parties interested should also sign this assent, only are required. but it is not generally understood



tors, and the guardians of persons interested therein, hereby consent that the above named petitioner be exempt from giving any surety on his [or, *her*] bond<sup>1</sup>].

### *Ancillary Administration.*

The probate court has jurisdiction in granting letters of administration on the estates<sup>2</sup> of non-resident persons, who, at the time of their decease,<sup>3</sup> have property within this commonwealth<sup>4</sup> whether such estates are solvent or insolvent, or the property real or personal, or both.<sup>5</sup> The petition for such an administration must be brought in the county, or one of the counties, in which such estate is situated.<sup>6</sup> This is true, although the deceased non-resident left a will, which has not been probated.<sup>7</sup> But whether administration has been granted elsewhere or not, this grant of such letters may be made,<sup>8</sup> and it is always to be treated as merely ancillary to the principal administration.<sup>9</sup>

The form of the petition for general administration<sup>10</sup> is used in cases of ancillary administration.

<sup>1</sup> A separate blank petition for appointment, giving bond without sureties, is furnished by the court, upon application.

5 Pick. 519 (1827); *Bowdoin v. Holland*, 10 Cush. 17 (1852).

<sup>3</sup> P. S., c. 156, § 2.

<sup>4</sup> *Martin v. Gage*, 147 Mass. 204 (1888).

<sup>2</sup> A debt due the deceased from a citizen of this commonwealth is estate. *Ex parte Picquet*, 5 Pick. 65 (1827). So, where a debtor has moved into this commonwealth since the death of the creditor. *Pinney v. McGregory*, 102 Mass. 186 (1869). The amount of estate makes no difference. *Harrington v. Brown*, 5 Pick. 519 (1827). So, where the estate is real estate supposed to have been fraudulently conveyed by the deceased. *Harrington v. Brown*,

<sup>5</sup> *Prescott v. Durfee*, 131 Mass. 477 (1881);

<sup>6</sup> *Crosby v. Leavitt*, 4 Allen 410 (1862).

<sup>7</sup> *Bowdoin v. Holland*, 10 Cush. 17 (1852).

<sup>8</sup> *Stevens v. Gaylord*, 11 Mass. 256 (1814); *Bowdoin v. Holland*, 10 Cush. 17 (1852).

<sup>9</sup> *Stevens v. Gaylord*, 11 Mass. 256 (1814).

<sup>10</sup> See page 73.

When it is so used add at the asterisk (\*) the words, "in said county of *Essex*"; and if administration has been taken out in the state of which the deceased was a resident, add the particulars of that fact to the petition.

*Administrators de bonis non.*

When an administrator dies, resigns, or is removed before he has fully administered the estate, if there is personal estate of the deceased not administered to the amount of twenty dollars, or debts to that amount remaining due from the estate, the probate court must grant letters of administration to some suitable person to administer the goods and estate of the deceased not already administered.<sup>1</sup>

This may be granted at any time, whether twenty years have elapsed since the death of the decedent or not.<sup>2</sup>

The petition for such an appointment is in the following form:—

To the Honorable the Judge of the Probate Court in and for the County of *Essex* :

Respectfully represents *John Smith*, of *Salem*, in the county of *Essex*, that on the *tenth* day of *March*, A. D. 1891, *Samuel Smith* was appointed, by this Court, administrator of the estate of *Thomas Smith*, late of *Topsfield*, in said county of *Essex*, farmer,<sup>2</sup> deceased; that the said *Samuel Smith* has deceased [or, been removed; etc.] without having fully administered said estate; that there are goods and estate of the said *Thomas Smith* to the amount of twenty dollars remaining to be administered; that your petitioner is<sup>3</sup>.

<sup>1</sup> P. S., c. 130; § 9. See *Hunt v. Holden*, 2 Mass. 168 (1806); *Chapin v. Hastings*, 2 Pick. 361 (1824).

<sup>2</sup> *Bancroft v. Andrews*, 6 Cush. 493 (1850).

<sup>3</sup> See preceding form.

Wherefore your petitioner prays that he [or, *she*], or some other suitable person, be appointed administrator [or, *-rix*] of the estate, not already administered, of said *Thomas Smith*,<sup>1</sup> and certifies that the statements herein contained are true to the best of his [or, *her*] knowledge and belief.

Dated this *first* day of *November*, A. D. 1892.

*John Smith.*

This must be sworn to by the petitioner, as in the ordinary case, and a certificate of the oath attached.

The petition is assented to as in the preceding form, following that form exactly, and varying it with the prayer of the petition for giving bond without sureties, if such is the case.

### *Special Administrators.*

When by reason of delay in granting letters testamentary or of administration, or when for any other cause the judge of the probate court deems it expedient to do so, he may at any time and place appoint a special administrator to collect and preserve the effects of the deceased; and in case of an appeal from the decree appointing him, such special administrator shall nevertheless proceed in the execution of his duties until it is otherwise ordered by the supreme court of probate.<sup>2</sup>

The appointment is made upon a petition in the following form:—

To the Honorable the Judge of the Probate Court in and for the County of *Essex*:

Respectfully represents *John Smith*, of *Lynn*, in the county of *Essex*, that *Thomas Smith*, who last dwelt in *Salem*, in said

<sup>1</sup> If a bond without sureties is desired to be given, follow the preceding form at this place.

<sup>2</sup> P. S., c. 130, §§ 10, 11.

county of *Essex*, farmer, died on the *eleventh* day of *May*, in the year of our Lord one thousand eight hundred and ninety-four, possessed of goods and estate remaining to be administered, and that there is delay in granting letters *testamentary* [or, *of administration*] on his estate, by reason of *an appeal taken from the decree of this court allowing the will of said deceased* [or, *appointing an administrator of the estate of said deceased*; or, *the want of any one to care, protect and preserve the estate of said deceased before an administrator can be appointed, and that it is in danger of being lost and destroyed*], and that your petitioner is *a son of the deceased* [etc., as in the preceding form of petition for the appointment of an administrator, page 74].

Wherefore your petitioner prays that he may be appointed special administrator of the estate of said deceased; and may be authorized to take charge of all the real estate of said deceased, and to collect rents and make necessary repairs, and certifies that the statements herein contained are true to the best of his knowledge and belief.

Dated this *sixteenth* day of *May*, A. D. 1894.

*John Smith.*

This petition must be sworn to as in the case of the ordinary petition. If parties in interest can be readily reached, and they are willing to assent to the prayer of the petition, they should assent in writing, as in the ordinary case of administration. Whether they assent or not, the court may order such notice to all parties as it deems proper.<sup>1</sup>

Every such appointment must be entered forthwith on the records of the court.

### *Public Administrators.*

In each county, the governor, with the advice and consent of the council, must appoint one or more

<sup>1</sup> P. S., c. 130, § 10.

public administrators, who shall hold office during the pleasure of the executive.<sup>1</sup>

Such administrators must take out letters of administration and faithfully administer upon the estates of persons who die intestate within their county or elsewhere, leaving property in such county to be administered, and not leaving a known husband, widow, or heir in the commonwealth.<sup>2</sup>

Administration shall not be granted to a public administrator when the husband, widow, or an heir of the deceased, in writing, claims the right of administration, or requests the appointment of some other suitable person to the trust, if such husband, widow, heir or other person accepts the trust and gives the bond required.<sup>3</sup>

If after the granting of letters of administration to a public administrator, and before the final settlement of the estate, the husband, widow, or an heir of the deceased in writing claims the right of administration, or requests the appointment of some other suitable person to the trust, or if a will of the deceased is thereafter proved and allowed, the probate court must grant letters of administration or letters testamentary accordingly; and when the person to whom such letters are so granted gives the bond required by law the public administratorship ceases.<sup>1</sup>

The following is the form of the petition for the appointment of a public administrator:—

To the Honorable the Judge of the Probate Court in and for the County of *Essex*:

Respectfully represents *John Smith* of *Ipswich*, in the county

<sup>1</sup> P. S., c. 131, § 1.

<sup>3</sup> P. S., c. 131, § 3.

<sup>2</sup> P. S., c. 131, § 2.

of *Essex*, public administrator in and for the county of *Essex*, that *Robert Levesque* died intestate, in *Ipswich*, in said county of *Essex*, on the *second* day of *September*, A. D. 1896, not leaving a known widow (or, *husband*) or heir in this commonwealth, that said deceased left property in said county of *Essex* to be administered, and that your petitioner is entitled to administer thereon;

Wherefore he prays that letters of administration on the estate of said deceased may be granted to him agreeably to the law in such cases made and provided, and certifies that the statements herein contained are true to the best of his knowledge and belief.

Dated this *first* day of *October*, A. D. 1896.

*John Smith.*

This petition must be sworn to as in the other cases.

Every public administrator must, upon the appointment and qualification of an executor or administrator as his successor, surrender into the probate court his letters of administration in such case, with an account under oath of his doings therein; and, upon a just settlement of such account, must pay over and deliver to his successor all sums of money remaining in his hands, and all property, effects and credits of the deceased not then administered.<sup>2</sup>

If, at any time within six years after a public administrator has made deposit with the state treasurer of the balance of an estate, any person applies to the probate court which granted letters of administration on such estate, and makes it appear that he is legally entitled by the will of the deceased or otherwise to the administration of the estate, the court must grant

<sup>1</sup> P. S., c. 131, § 4.

<sup>2</sup> P. S., c. 131, § 5.



letters of administration thereof, or, upon probate of such will, letters testamentary to such applicant, or at his request to some other suitable person ; but before granting such administration, the court must order personal notice of the application to be served, at least fourteen days before the hearing, upon a public administrator of the county, who shall appear in behalf of the commonwealth.<sup>1</sup> After thirty days from such appointment, if there is no due appeal, the state treasurer must pay over to such executor or administrator all money deposited in the state treasury to the credit of such estate, to be administered in like manner as the estates of other deceased persons.<sup>2</sup>

Upon the death, resignation, or removal of a public administrator, the probate court must issue a warrant to some other public administrator, in the same county, on his application therefor, requiring him to examine the accounts of such late public administrator touching the estates on which he has taken out letters of administration, and to return into the court a statement of all of such estates that are not fully administered, and of the balance of each estate that was in the hands of such administrator at the time of his death, resignation, or removal. And thereupon the court must issue to the public administrator making such return letters of administration upon such of said estates as are not already administered, although the personal estate remaining may not amount to twenty dollars.<sup>3</sup>

#### *Notice.*

If an administrator's bond be with sureties, and all the parties in interest who have the right of ap-

<sup>1</sup> P. S., c. 131, § 14.

<sup>3</sup> P. S., c. 131, § 16.

<sup>2</sup> P. S., c. 131, § 15.

pointment prior to the petitioner have consented in writing to the appointment, the petition can be presented to the judge for his decree.<sup>1</sup> This can be done on a court day, when the court is in formal session, or at any other reasonable time.

If the bond be without sureties, the heirs at law and parties in interest must consent in writing, and the creditors of the deceased must be cited into court to object thereto<sup>2</sup> by citation issued by the register and printed in some newspaper<sup>3</sup> published in the county, once a week for three successive weeks, the last publication to be one day at least before the return day named therein. The statute authorizing this is as follows:—

An administrator of an intestate estate shall be exempt from giving a surety or sureties on his bond, when all the persons interested in the estate, who are of full age and legal capacity, other than creditors, certify to the probate court their consent thereto; but not until all the creditors of the estate, and the guardian of any minor interested therein, have been notified and have had opportunity to show cause against the same; but such administrator shall in all cases give his own personal bond, with conditions as prescribed by law.<sup>4</sup>

The probate court may at or after the granting of letters of administration require a bond, with sufficient surety or sureties, if it is of opinion that such bond is required by a change in the situation or cir-

<sup>1</sup> The petition of a special administrator is exceptional. No notice is required, usually. See *Special Administrators*, page 78.

<sup>2</sup> *Abercrombie v. Sheldon*, 8 Allen 532 (1864).

<sup>3</sup> See St. 1885, c. 235.

<sup>4</sup> St. 1885, c. 274, § 1.

cumstances of such administrator, or for other sufficient cause.<sup>1</sup>

Every administrator who neglects to give bond, with surety or sureties, when required by the probate court within such time as it directs, in accordance with the provision of the preceding paragraph, is considered to have declined or resigned the trust.<sup>2</sup>

The citation is furnished by the register without a fee being paid, and is delivered to the newspaper in which it is ordered to be published in the citation by the party doing the business in the court. The expense of publishing such a citation is ordinarily three dollars, which must be paid by the estate. The newspaper which will give the more extended notice to the parties interested in the estate is the one to be selected; a newspaper published in the place where the deceased last dwelt, if there is one, is generally to be chosen.

The return on the citation may be made by any one who knows that it was published as ordered. The form of the return, and of the certificate of the oath of the person making the return (which must be sworn to) is as follows:—

I have served the foregoing citation as therein ordered.

*John Smith.*

*Essex, ss. December 1st, A. D. 1892.* Then personally appeared *John Smith*, and made oath that the above return by him [or, *her*] subscribed is true.

Before me, *John Gifford*, Justice of the Peace.

<sup>1</sup> St. 1885, c. 274, § 1.

<sup>2</sup> St. 1885, c. 274, § 2.

## APPEARANCE.

When the case is called up in court by the petitioner, any one wishing to be heard can state his objections or produce evidence in the matter, but no extended hearing will usually be given on court day. The proper procedure is for the objector to enter his appearance in writing, either personally or by attorney. This appearance is in the following form, and is to be filed with the register:—

*Essex, ss.*

## PROBATE COURT.

No. 10,297.

Estate of *Thomas Smith.*

In the matter of *petition of*  
*John Smith, for appointment*  
*of administrator.*

TO THE REGISTER.

Enter *my* [or, *our*] appearance  
for

*Henry Smith,*  
*Susan Adams.*

*Rufus Choate, Attorney.*

Address, *500 Essex Street,*  
*Salem, Mass.*

Upon the request of any party interested, at any time after the return day of the citation, the judge will assign a certain day of his own selection for a hearing. The party requesting the hearing must give reasonable notice, in such a manner that the assignment and its date will be actually brought to the knowledge of the other party or his attorney in the case. No pleadings are required. On the date of the hearing the parties and their wit-

nesses meet in the court, and the petitioner opens his case. The proceedings are simple, though following the practice in the common-law courts. If the court decides in favor of the petitioner, any other party in interest can appeal,—in which case, for further proceedings, see the general subject of APPEALS, page 45.

#### BOND.

All official bonds must be approved by the judge of the court in writing.

#### *Bond With Sureties.*

All administrators, including special administrators<sup>1</sup> and public administrators, except those public administrators who have filed a general bond, upon their appointment qualify by filing in the court a bond, which must first be approved by the judge of the court, and his approval under his official signature written thereon.<sup>2</sup> Sureties must be inhabitants of this commonwealth, and satisfactory to the judge.<sup>3</sup> The bond must be signed by the administrator<sup>4</sup> and sureties and be sealed, and may be witnessed. If the parties or either of them sign by their mark there should be two witnesses. A bond cannot ordinarily be signed by attorney. When bonds are required to be given by two or more joint administrators, they may give either separate or joint bonds.<sup>5</sup>

The following form must be used when sureties are given :—

KNOW ALL MEN BY THESE PRESENTS,

That we, *John Smith* of *Salem*, in the county of *Essex*, as principal, and *Allen Rogers* of *Danvers*, in the county of *Essex*,

<sup>1</sup> P. S., c. 130, § 11.

<sup>2</sup> P. S., c. 143, § 2.

<sup>3</sup> P. S., c. 143, § 1.

<sup>4</sup> *Wood v. Washburn*, 2 Pick. 24 (1823).

<sup>5</sup> P. S., c. 143, § 3.

and *Stephen Brown* of *Cambridge*, in the county of *Middlesex*, as sureties, and all within the Commonwealth of *Massachusetts*, are holden and stand firmly bound and obliged unto *Charles A. Devin*, Esquire, Judge of the Probate Court in and for the county of *Essex*, in the full and just sum of *ten thousand* dollars, to be paid to said Judge and his successors in said office; to the true payment whereof we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals, and dated the *first* day of *December*, in the year of our Lord one thousand eight hundred and ninety-two.

The condition of this obligation is such that if the above-bounden *John Smith*, administrator [or, *-rix*] of the estate of *Thomas Smith*, late of *Salem*, in said county of *Essex*, merchant, deceased, intestate, shall,

First, make and return to said Probate Court, within three months after his [or, *her*] appointment, a true inventory of all the real and personal estate of said deceased which at the time of the making of such inventory shall have come to the possession or knowledge of said administrator [or, *-rix*];

Second, administer according to law all the personal estate of said deceased which may come to the possession of said administrator [or, *-rix*], or of any person for him [or, *her*], and also the proceeds of any of the real estate of said deceased that may be sold or mortgaged by said administrator [or, *-rix*];

Third, render upon oath a true account of his [or, *her*] administration at least once a year, until his [or, *her*] trust is fulfilled, unless [*s*]he is excused therefrom in any year by said court, and also render such account at such other times as said court may order;

Fourth, pay to such persons as said court may direct any balance remaining in his [or, *her*] hands, upon the settlement of his [or, *her*] accounts; and

Fifth, deliver his [or, *her*] letters of administration into said court in case any will of said deceased is hereafter duly proved and allowed.



Then this obligation to be void, otherwise to remain in full force and virtue.

Signed, sealed and delivered  
in presence of

*Susan Thompson,*

*Samuel Day,*

*John Smith,* [Seal]

his  
*Allen X Rogers,* [Seal]  
mark.

*Stephen Brown,* [Seal]

*Essex, ss. December 10, 1892. Examined and approved.*

*Charles A. Devin,* Judge of Probate Court.

### *Bond Without Sureties.*

An administrator of an intestate estate is exempt from giving a surety or sureties on his bond when all persons interested in the estate, who are of full age and legal capacity, other than creditors, certify to the probate court their consent thereto; but not until all the creditors of the estate, and the guardian of any minor interested therein, have been notified and have had opportunity to show cause against the same; but such administrator must in all cases give his own personal bond, with conditions as prescribed by law; provided, that the probate court may at or after the granting of letters of administration require a bond, with sufficient surety or sureties, if it is of opinion that such bond is required by a change in the situation or circumstances of such administrator, or for other sufficient cause.<sup>1</sup>

Every administrator who neglects to give bond, with surety or sureties, when required by the probate court within such time as it directs, in accordance with the provisions of the preceding paragraph, is considered to have declined or resigned the trust.<sup>2</sup>

<sup>1</sup> St. 1885, c. 274, § 1.

<sup>2</sup> St. 1885, c. 274, § 2.

The bond without sureties must be in the following form (the condition being the same as in the bond with sureties):—

KNOW ALL MEN BY THESE PRESENTS,

That I, *John Smith*, of *Salem*, in the County of *Essex*, in the Commonwealth of Massachusetts, am holden and stand firmly bound and obliged unto *Charles A. Devin*, Esquire, Judge of the Probate Court in and for the County of *Essex*, in the full and just sum of *ten thousand* dollars, to be paid to said Judge and his successors in said office; to the true payment whereof I bind myself and my heirs, executors and administrators, by these presents. Sealed with my seal, and dated the *first* day of *December*, in the year of our Lord one thousand eight hundred and ninety-two.

[Condition as in bond with sureties.]

Signed, sealed and delivered  
in presence of

*Samuel Day*.

*John Smith* [Seal]

*Bond of Administrator de bonis non.*

The bond of an administrator *de bonis non* is the same in form as that of an original administrator, except after the word “estate,” in the commencement of the condition, the words “not already administered” should be added.

*Bond of Special Administrator.*

A special administrator’s bond is the same as that of an ordinary administrator, except the condition,<sup>1</sup> which is as follows:—

The condition of this obligation is such that if the above-bounden *John Smith*, special administrator of the estate of *Thomas Smith*, late of *Salem*, in said county of *Essex*, farmer, deceased, shall

<sup>1</sup> P. S., c. 130, § 11.

Make and return to said Probate Court, within three months after his appointment, said court having so ordered, a true inventory of all the personal estate of said deceased, which at the time of the making of such inventory shall have come to his possession or knowledge; and, whenever required by said court, truly account, on oath, for all the estate of said deceased that may be received by him as such special administrator, and deliver the same to any person who may be appointed executor or administrator of said deceased, or may be otherwise lawfully authorized to receive the same;

Then this obligation to be void, otherwise to remain in full force and virtue.

### *Bond of Public Administrator.*

A public administrator's bond is also the same as that of an ordinary administrator, except the condition, which is as follows:—

The condition of this obligation is such that if the above-bounden *John Smith*, public administrator in and for said county of *Essex*, administrator of the estate of *Robert Levesque*, late of *Ipswich*, in said county of *Essex*, farmer, deceased, intestate, shall,

First, make and return to said Probate Court, within three months after his appointment, a true inventory of all the real and personal estate of said deceased which at the time of the making of such inventory shall have come to the possession or knowledge of said administrator;

Second, administer, according to law, all the personal estate of said deceased which may come to the possession of said administrator, or of any person for him, and also the proceeds of any of the real estate of said deceased that may be sold or mortgaged by him;

Third, render upon oath a true account of his administration at least once a year, until his trust is fulfilled, unless he is excused therefrom in any year by said court, and also render such account at such other times as said court may order;

Fourth, pay the balance of said estate remaining in his hands, upon the settlement of his accounts, to such persons as said court may direct; and, when said estate has been fully administered, to deposit with the treasurer of the Commonwealth the whole amount remaining in his hands;

Fifth, upon the appointment and qualification in any case of an executor or administrator as his successor, to surrender into said court said letters of administration, with an account, under oath, of his doings therein; and, upon a just settlement of such account, to pay over and deliver to such successor all sums of money remaining in his hands, and all property, effects and credits of said deceased not then administered;—then this obligation to be void, otherwise to remain in full force and virtue.<sup>1</sup>

A public administrator may give a bond with sufficient sureties for the faithful administration of all estates on which letters of administration are granted to him as such public administrator, instead of a bond in each case.<sup>2</sup> The form of such a bond is as follows:—

#### KNOW ALL MEN BY THESE PRESENTS,

That I, *John Smith*, of *Salem*, in the county of *Essex*, as principal, and *Andrew Wilson and Moses Sanborn*, both of *Salem*, as sureties, and all within the Commonwealth of Massachusetts, are holden and stand firmly bound and obliged unto *George E. Maines*, Esquire, Judge of the Probate Court in and for the county of *Essex*, in the full and just sum of *ten thousand* dollars, to be paid to said Judge, and his successors in said office; to the true payment whereof we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

<sup>1</sup> P. S., c. 131, § 6.

<sup>2</sup> P. S., c. 131, § 7.

Sealed with our seals. Dated the *tenth* day of *August*, in the year of our Lord one thousand eight hundred and *ninety-one*.

The condition of this obligation is such, that if the above-bounden *John Smith*, as public administrator in and for said county of *Essex*, shall,

First, make and return to said Probate Court within three months from the time of the granting to him, as public administrator, of letters of administration on the estate of a person deceased, a true inventory of all the real and personal estate of such person which at the time of the making of such inventory shall have come to his possession or knowledge;

Second, administer according to law all personal estate of every such person which may come to the possession of said administrator, or of any person for him, and also the proceeds of any of the real estate of such person that may be sold by said administrator;

Third, render upon oath a true account of his administration of every such estate at least once a year, until the trust is fulfilled, unless he is excused therefrom in any year by said court; and also render such account at such other times as said court may order;

Fourth, pay the balance of every such estate remaining in his hands upon the settlement of his accounts to such persons as said court may direct; and, when such estate has been fully administered, to deposit with the treasurer of the Commonwealth the whole amount remaining in his hands; and,

Fifth, upon the appointment and qualification in any case of an executor or administrator or his successor, to surrender into said probate court his letters of administration in such case, with an account under oath of his doings therein, and, upon a just settlement of such account, to pay over and deliver to such successor all sums of money remaining in his hands, and all property, effects, and credits of the deceased not then

administered;—then this obligation to be void, otherwise to remain in full force and virtue.

Signed, sealed, and delivered,  
in the presence of

*John Ames,*  
to all.

*John Smith,* [Seal]  
*Andrew Wilson,* [Seal]  
*Moses Sanborn,* [Seal]

*Essex, ss. August 20, A. D. 1891. Examined and approved.*

*George E. Maines, Judge of Probate Court.*

The court may at any time require additional sureties to be furnished upon such administrator's bond, or may require a new bond to be given.<sup>1</sup>

### *Statement of Property.*

On the back of every bond should be a statement signed by the administrator, showing the estimated amount of real and personal estate of which the deceased died possessed, the following form being generally used :—

I, *John Smith*, the within-named administrator [or, -rix], declare that, to the best of my knowledge and belief, the estate and effects of the within-named deceased do not exceed in value the following-mentioned sums, viz.:

Real Estate,       \$6,000

Personal Estate,   \$6,500

[Sign]       *John Smith.*

This is done that the court may know how large the penalty of the bond should be made. The law requires a “sufficient” bond, which is as to the amount at least fifty per cent. more than the value of the property belonging to the estate.

<sup>1</sup> P. S., c. 131, § 8.



*Sufficiency of Sureties.*

Another question as to the sufficiency of a bond concerns bonds with sureties only, and that is the ability of the sureties to answer if there is a default on the part of the administrator. They must be persons (either men or women, heirs or legatees, and either strangers or relatives, even husband or wife of the principal), who have an amount of property actually their own to the amount named in the bond, and ordinarily it should consist of real estate. The court can examine the sureties, and any party in interest can have a hearing on the matter of their acceptance if they so request. If no contention is made, and the court thinks they are sufficient, either with or without a hearing or an examination, they will be approved. But ordinarily the court requires a statement from some responsible person, a county or town or city officer being preferred, who has reason for his opinion, as to their sufficiency. For this purpose the bonds furnished by the court in blank have the following form printed on their back :—

The sureties on the within bond are, in my opinion, sufficient.

<i>Thomas Adams,</i>	<i>Assessor</i>	<i>of</i>	<i>Salem.</i>
Name.	Office.		County or Town.

*Corporations as Sureties.*

Any company organized under St. 1894, c. 522, or chartered by any other state or government to transact fidelity insurance and corporate suretyship, and qualified to do business in this commonwealth, may be a surety on probate bonds. See sections 29 and 61 of said chapter. The court may allow, in his discre-

tion, as a charge against the estate in which such bond is required, money paid, with his approval, to any such corporation for acting as such sureties.<sup>1</sup>

### *Remedy on Bond.*

The principal and sureties of a probate bond may be sued in the superior court in the county in which the bond was taken for a breach of its condition.<sup>2</sup>

*What Constitutes a Breach.*—There is no breach of a probate bond if the administrator fails to return an inventory or render an account when there are no assets; and in a suit on a bond for neglecting to do so, it is necessary to aver that some property of the intestate came to the hands of the administrator.<sup>3</sup>

An administrator's bond given in this commonwealth does not cover proceedings under letters of ancillary administration taken out in another state. But money received in another state, from debtors residing here, is to be accounted for in this state.<sup>4</sup>

The non-performance of a decree is no breach of the administrator's bond, when such decree is null and unauthorized by law.<sup>5</sup>

For the failure of an administrator to account within one year, no action lies on his probate bond, after an allowance by the judge of probate, at the request of all parties in interest, of an account subsequently rendered by him.<sup>6</sup>

Where the breach is in the failure or neglect of the administrator to render an account, he should be

<sup>1</sup> St. 1886, c. 233.

<sup>2</sup> St. 1897, c. 131.

<sup>3</sup> *Walker v. Hall*, 1 Pick. 20 (1822).

<sup>4</sup> *Hooper v. Olmstead*, 6 Pick. 481 (1828).

<sup>5</sup> *Dawes v. Head*, 3 Pick. 128 (1825);

*Hancock v. Hubbard*, 19 Pick. 167 (1837).

<sup>6</sup> *Loring v. Kendall*, 1 Gray 305 (1854).

cited by the probate court to do so before suit is brought on his bond.<sup>1</sup>

For other cases showing what is or is not a breach of an administrator's bond, see footnote.<sup>2</sup>

*Prerequisites to Suit.*—Except in the three classes of cases named on page 98, when any one who has the right desires to bring such a suit, he must petition the court, stating the facts, and praying that an action may be brought in the name of the judge upon the bond for the benefit of the petitioner. The court may thereupon, with or without notice to the obligor and his sureties, authorize the suit to be brought.<sup>3</sup> This authority can be given only by a decree in writing.<sup>4</sup> This may be done though the wife of the judge may be a party defendant, and though the bond was given to his predecessor.<sup>5</sup>

When the judge is obligor, either as principal or as surety, in a bond given to a former judge of the court, any suit duly authorized may be brought upon such bond in the name of the judge mentioned therein, or in the name of his executor or administrator, and the register of probate may authorize the suit in like manner and upon the same conditions as the court.<sup>6</sup>

<sup>1</sup> P. S., c. 144, § 8. See *Richardson v. Oakman*, 15 Gray 57 (1860).

<sup>2</sup> *Coney v. Williams*, 9 Mass. 114 (1812); *Freeman v. Anderson*, 11 Mass. 190 (1814); *Daves v. Sweet*, 14 Mass. 105 (1817); *Baylies v. Chace*, 1 Pick. 230 (1822); *Hooker v. Bancroft*, 4 Pick. 50 (1826); *Newcomb v. Goss*, 1 Met. 333 (1840); *Fay v. Taylor*, 2 Gray 154 (1854); *Bennett v. Overing*, 16 Gray 267 (1860); *Robinson v. Hodge*, 117 Mass. 222 (1875); *McKim v. Bartlett*, 129 Mass. 226 (1880); *McKim v. Blake*, 132 Mass. 343 (1881); *Choate v. Jacobs*, 136 Mass. 297 (1884).

<sup>3</sup> P. S., c. 143, § 13.

<sup>4</sup> *Fay v. Rogers*, 2 Gray 175 (1854). Evidence cannot be introduced to show that the decree was not actually written out until after the action was brought, if the decree was granted and is dated prior to the date of the writ. *Richardson v. Hazelton*, 101 Mass. 108 (1869). The administrator cannot contest the validity of the order authorizing the suit. *Bennett v. Woodman*, 116 Mass. 518 (1875).

<sup>5</sup> St. 1896, c. 208.

<sup>6</sup> P. S., c. 143, § 14.

The following is the form of a petition to the probate court for leave to sue an administrator on his bond:—

To the Honorable the Judge of the Probate Court for the county of *Essex*.

Respectfully represents *John Jones* of *Salem*, in said county of *Essex*, that he is a creditor of the estate of *Thomas Smith*, late of said *Salem*, deceased; that at a probate court holden at *Gloucester*, in and for said county of *Essex*, on the twentieth day of September, A. D. 1892, *John Smith* of *Salem*, in said county of *Essex*, was duly appointed administrator of said estate, and gave bond, with *Andrew Hobson* and *James Johnson*, both of said *Salem*, as sureties, for the faithful discharge of said trust; that afterwards, to wit, on the first day of April, A. D. 1894, the said *John Smith* represented said estate to be insolvent, and that upon such representation commissioners were duly appointed to receive and examine the claims of creditors against said estate; that said commissioners made their return to the probate court on the thirtieth day of October last past, and reported the claim of your petitioner against said estate to have been allowed by them; that more than six months have elapsed since said return was made by said commissioners, but that said *John Smith* has neglected and still neglects to render any account of his administration of said estate, and is thereby delaying the distribution of the assets in his hands among the persons entitled thereto [or, that no inventory has been filed, three months from said date of appointment having elapsed; etc.]. Wherefore your petitioner prays that he may be authorized to bring an action in the superior court upon the bond of said administrator in the name of the judge of the probate court, for the recovery of the damage sustained by such neglect of the said *John Smith*.

Dated this tenth day of June, A. D. 1895.

*John Jones.*

The decree upon such a petition is in the following form:—

At a Probate Court holden at *Salem*, in and for said county of *Essex*, on the *second* day of *July*, in the year of our Lord one thousand eight hundred and *ninety-five*.

On the petition of *John Jones* of *Salem*, in said county, representing that he is a creditor of the estate of *Thomas Smith*, late of said *Salem*, deceased, and that *John Smith*, administrator of said estate, has neglected to render his account of administration, and has thereby delayed the distribution of said estate among the persons entitled thereto, and praying that he may be authorized to bring an action, in the name of the judge of the probate court, upon the bond of said *John Smith*:

It appearing that notice thereof has been given as ordered, and that more than six months have elapsed since the return of the commissioners appointed to receive and examine the claims of creditors against said estate was made to this court, and that said *John Smith* has neglected and still neglects to render and settle his accounts, and is thereby delaying the distribution of said estate, and that said *John Jones* is aggrieved by such neglect of said *John Smith*, it is decreed that said *John Jones* be and he is hereby authorized to bring an action in the superior court on the bond of the said *John Smith*, in the name of the judge of the probate court, for the recovery of any and all damages sustained by such maladministration of said *John Smith*.

*James H. Hayden*, Judge of Probate Court.

*Who may bring Suit.*—Bonds of administration may be put in suit by a creditor of the deceased for his own benefit, when such creditor has recovered judgment for his debt against the administrator, who has neglected upon demand made by him to pay the judgment or to show sufficient goods or estate of the

deceased to be taken on execution for that purpose.<sup>1</sup>

If the estate is insolvent, a creditor may bring such suit when the amount due to him has been ascertained by the decree of distribution, if the administrator neglects to pay such amount when demanded.<sup>2</sup>

Such suit may be brought by a person who is next of kin to recover his share of the personal estate after a decree of the probate court ascertaining the amount due to him, if the administrator neglects to pay such amount when demanded.<sup>3</sup>

In the above three classes of cases only, authority from the probate court to bring suit need not be obtained.<sup>4</sup>

When it appears to the probate court, on the representation of any person interested in an estate, that the administrator has failed to perform his duty in any particular not before specified, the court may authorize any creditor, next of kin, or other person aggrieved by such maladministration, to bring an action on the bond.<sup>5</sup>

A creditor cannot institute a suit in the name of the judge of probate on the bond, for his own benefit, for neglect to inventory real estate fraudulently conveyed by the intestate to his administrator. But, if the administrator, upon notice, does not obtain license, in such case, to sell the estate, or otherwise account for it, the judge himself can sue the bond for the benefit of all parties interested.<sup>6</sup>

<sup>1</sup> P. S., c. 143, § 10; *Dawes v. Head*,  
3 Pick. 128 (1825).

<sup>2</sup> P. S., c. 143, § 11.

<sup>3</sup> P. S., c. 143, § 12.

<sup>4</sup> *White v. Weatherbee*, 126 Mass. 450  
(1879).

<sup>5</sup> P. S., c. 143, § 13.

<sup>6</sup> *Newcomb v. Wing*, 3 Pick. 168 (1825).



An action cannot be brought on an administration bond for the benefit of a creditor of an heir of the intestate.<sup>1</sup>

An action cannot be brought for the benefit of an individual creditor, for neglect to render an administration account for more than six months after the report of the commissioners of insolvency. It ought to be brought for the benefit of all parties interested.<sup>2</sup>

The father of a minor interested in the estate of a deceased person, if he has no adverse interest therein, may petition the court, as next friend of such minor, for leave to bring suit upon the administrator's bond.<sup>3</sup>

The administrator of the next of kin can bring an action on a probate bond.<sup>4</sup>

It is no defence to an action upon a probate bond, brought in the name of the judge of probate for breach of its conditions in not accounting, that the person upon whose representation the action was brought will receive no benefit from a recovery upon the bond.<sup>5</sup>

*Indorsement of the Writ.*—The writ, in every action brought in the three classes of cases named on page 98, must be indorsed by the person or persons for whose benefit or at whose request the action is brought, or by their attorney, and the indorsers are liable for the costs of suit, and execution therefor must be issued against them, and not against the

<sup>1</sup> *Fay v. Hunt*, 5 Pick. 398 (1827).

<sup>3</sup> *Stevens v. Cole*, 7 Cush. 467 (1851).

<sup>2</sup> *Barton v. White*, 21 Pick. 58

<sup>4</sup> *White v. Weatherbee*, 126 Mass.

(1838). See *Coney v. Williams*, 9

450 (1879).

Mass. 114 (1812); *Fay v. Haven*, 3 Met.

<sup>5</sup> *Bennett v. Woodman*, 116 Mass. 518 (1875).

judge in whose name the action is brought.<sup>1</sup> The judge is not responsible for the costs.<sup>2</sup>

When the action is brought for the benefit of creditors or next of kin, there must also be an indorsement on the writ, specifying that it is brought for the benefit of such creditors or next of kin.<sup>3</sup>

In an action by the judge of probate upon an administrator's bond, in which the breach assigned in the declaration is that he has neglected and refused to render and settle his account of administration, though cited and required by the judge of probate to do so, the writ should not bear upon it an indorsement that the action is brought for the benefit of the heirs at law of the intestate, or any other particular person; and if it does, and it appears that the action is in fact brought for the benefit of all persons interested in the estate, the court may, on motion of the plaintiff, order the indorsement to be stricken off, after which the action may be prosecuted by the plaintiff to final judgment.<sup>4</sup>

*Practice.*—A suit on an administration bond cannot be referred by the judge of probate.<sup>5</sup>

In an action on an administration bond for not settling an account, the question of fraud in the settlement of the administrator's account cannot be tried.<sup>6</sup>

If the principal in the bond is resident within the commonwealth at the commencement of the action, and is not made a defendant therein, or is not served with process, the court may, at the request of any of

<sup>1</sup> P. S., c. 143, § 15.

<sup>2</sup> *Paine v. Hapgood*, 13 Pick. 152 (1832).

<sup>3</sup> P. S., c. 143, § 15.

<sup>4</sup> *Bennett v. Russell*, 2 Allen 537 (1861).

<sup>5</sup> *Thomas v. Leach*, 2 Mass. 152 (1806).

<sup>6</sup> *Paine v. Stone*, 10 Pick. 75 (1830).

the sureties, continue or postpone the action so long as may be necessary to summon or bring in the principal.<sup>1</sup> The sureties may take out a writ, in such form as the court may prescribe, to arrest the principal or to attach his goods or estate, and to summon him to appear and answer as defendant in the original action. If, after being served with such process fourteen days at least before the time appointed for him to appear and answer to the suit, he neglects so to do, and if judgment is for the plaintiff, such judgment must be rendered against the principal obligor with the other defendants in the same manner as if he had been originally a party to the suit. An attachment or bail on such process is liable to respond to the judgment in like manner as if made or taken in the original suit.<sup>2</sup>

*Execution.*—When it appears that the condition of the bond of an administrator has been broken, the court upon a hearing in equity must award execution in the name of the plaintiff as follows:—*First*, If the action is brought for the benefit of a creditor, execution must be awarded for the use of the creditor for the amount due to him upon the judgment that he has recovered, or upon the decree of distribution in his favor. *Second*, If the action is brought for the benefit of a person who is next of kin, execution must be awarded for the use of such person for the amount due to him according to the decree of the probate court. *Third*, If the action is brought for a breach of the condition in not accounting for the estate as required by law, execution must be awarded,

P. S., c. 143, § 16.

<sup>2</sup> P. S., c. 143, § 17.

without expressing that it is for the use of any person, for the full value of all the estate of the deceased that has come to the hands of the administrator, and for which he does not satisfactorily account, and for all damages occasioned by his neglect or maladministration. *Fourth*, If the action is brought for any other breach of the condition of the bond, execution must be awarded for such amount and for the use of such person or persons, or without expressing it to be for the use of any particular person, as the court may deem proper. *Fifth*, If there are two or more persons for whose use execution is to be awarded, a separate execution must be issued for the sum due to each of them. *Sixth*, The execution must include the costs of suit, as well as the debt or damages; and if there is more than one execution, the costs shall be equally divided between them.<sup>1</sup>

When an execution awarded under the preceding paragraph is expressed to be for the use of a particular person, such person must be considered as the judgment creditor, and may cause the execution to be levied in his name and for his benefit, as if the action had been brought and the judgment recovered in his name.<sup>2</sup>

When such an execution is awarded without expressing it to be for the use of any particular person, all money received thereon must be paid to the co-administrator, if there is any, or to the person who is then the rightful administrator, and it is assets in his hands to be administered according to law.<sup>3</sup>

If, after execution has once been awarded in a suit

<sup>1</sup> P. S., c. 143, § 20.

<sup>3</sup> P. S., c. 143, § 22.

<sup>2</sup> P. S., c. 143, § 21.

upon a bond, the administrator commits a new breach of the condition of the bond, or if a creditor, next of kin, or other person interested in the estate, has a claim for further damages on account of any neglect or maladministration of the administrator, a writ of *scire facias* on the original judgment may be sued out in like manner as is provided for the commencement of the original suit; and the court will thereupon proceed to award a new execution in like manner as might have been done in the original suit.<sup>1</sup>

The court may leave the question of the amount of the execution to be awarded to a jury.<sup>2</sup>

### *New Bond.*

When the sureties or the penal sum in a probate bond are insufficient, the supreme judicial court or the probate court may, after notice to the principal in such bond, require a new bond with such surety or sureties and in such penal sum as the court directs.<sup>3</sup>

The petition to the court that an administrator be required to furnish a new bond is in the following form:—

To the Honorable the Judge of the Probate Court in and for the County of *Essex* :

Respectfully represents *John Jones* of *Salem*, in the county of *Essex*, that he is *an heir at law* [or, *a creditor*; etc.] of *Thomas Smith*, late of *Salem*, in the county of *Essex*, *merchant, deceased*, and is interested in the estate of the said deceased; that at a probate court held at *Salem*, on the *first* day of *September*, A. D. 1896, *John Smith*, of said *Salem*, was duly appointed administrator of the estate of said deceased, and gave

<sup>1</sup> P. S., c. 143, § 23.

<sup>3</sup> P. S., c. 143, § 5.

*Defriez v. Coffin*, 155 Mass. 203 (1892).

bond in the sum of *five thousand* dollars, with *Samuel Adams* of said *Salem*, and *Henry Wasson* of *Danvers*, in said county of *Essex*, as sureties, for the faithful discharge of his trust; that said estate is not fully administered; that said sureties are not sufficient to ensure the faithful discharge of said trust; the said *Henry Wasson* having removed from the commonwealth [or, become insolvent; or, the said administrator having received ten thousand dollars as assets of the estate; etc.].

Wherefore he prays that said *John Smith* may be required to give a new bond with such sureties and in such sum as the court may direct.

Dated this *second* day of *January*, A. D. 1897.

*John Jones.*

Personal service of the citation on this petition upon the administrator will be ordered by the court. The decree ordering a new bond is as follows:—

*Essex*, ss.

At a Probate Court holden at *Salem*, in and for said county of *Essex*, on the *twentieth* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-seven*.

On the petition of *John Jones*, praying that *John Smith*, administrator of the estate of *Thomas Smith*, late of *Salem*, in said county of *Essex*, merchant, deceased, may be ordered to furnish a new bond with sufficient sureties.

Said *John Smith* having had due notice thereof, and it appearing reasonable and proper that the prayer of said petition be granted,

It is decreed that said *John Smith* file a new bond, with sufficient sureties, in the sum of *five thousand* [or, *fifteen thousand*; etc.] dollars, on or before the *first* day of *February*, A. D. 1897.

*Charles N. Adams*, Judge of Probate Court.

### *Release of Sureties on Bond.*

A surety on a probate bond may, upon his petition to the supreme judicial court or probate



court, be discharged from all further responsibility, if the court, after due notice to all persons interested, deems such discharge reasonable and proper; and the principal must thereupon give a new bond, with such surety or sureties<sup>1</sup> and within such time as the court may order, or be removed from the trust.<sup>2</sup>

In case of the marriage of a woman who is an administratrix, her sureties have the right, on petition to the probate court in which her bond is filed, to be released from any further liability on such bond, beyond accounting for and paying over the money and property already in her hands by virtue of said trust; and in case her sureties are so released she must be required to furnish a new bond to the satisfaction of said court, or be discharged from the trust.<sup>3</sup>

When a surety is released by the court, his liability continues until the new bond is approved by the court.<sup>4</sup>

The following is the form of such a petition:—

To the Honorable the Judge of the Probate Court in and for the County of *Essex*:

Respectfully represents *John Andrews* of *Boxford*, in the county of *Essex*, that by a decree of said court, dated the *second* day of *June*, A. D. 1891, *Jane Ames* of *Danvers*, in the county of *Essex*, was appointed *administratrix* of the estate of *Henry Mondy*, late of said *Danvers*, deceased, and gave bond for the faithful discharge of said trust; that your petitioner is one of the sureties on said bond; that the other surety on said bond is *George Tappan* of *Danvers*, in said county of *Essex*, that the estate of said deceased is not yet fully administered; and your petitioner is unwilling to remain longer liable as surety on said

<sup>1</sup> P. S., c. 143, § 6.

<sup>2</sup> P. S., c. 143, § 7.

<sup>3</sup> P. S., c. 143, § 9.

<sup>4</sup> P. S., c. 143, § 8.

bond, for the reason that *said Jane Ames has married since said date of appointment; and that she is now the wife of Thomas Anderson.*

Wherefore your petitioner prays that he may be discharged from all further responsibility as such surety, and that said *Jane Anderson* may be ordered to furnish a new bond.

Dated this *tenth* day of *October*, A. D. 1892.

*John Andrews.*

All parties interested may assent to this petition in the following form :—

The undersigned, being all the persons interested in the foregoing petition, request that the prayer thereof be granted without further notice.

If they do not assent they must be cited ; and the administrator and co-surety must be given personal notice of the petition, etc., fourteen days before the return day ; and all other parties are cited by publication in a newspaper once each week for three successive weeks.

The decree will be, “that said *Jane Anderson* on or before the *fifteenth* day of *November*, A. D. 1892, file in said court a new bond with sufficient sureties in the sum of *five thousand* dollars, for the faithful discharge of said trust, and that said *John Andrews* be discharged from all further responsibility as such surety from and after the date of the approval of said new bond.”

#### APPOINTMENT OF AGENT.

When a person, who resides in another state, or who has removed to another state thereafter, has been appointed in this commonwealth administrator of the estate of a deceased person resident herein, he must,

before letters of administration are issued to him,<sup>1</sup> appoint an agent resident here to receive service of process against him and the estate.<sup>2</sup>

If such agent dies or removes from the commonwealth before the final settlement of the estate another one must be appointed.<sup>3</sup>

The powers of such agent cannot be revoked until another like agent has been appointed in his place.<sup>4</sup>

Neglect or refusal on the part of an administrator to appoint an agent, or a new agent, may be deemed good cause for his removal.<sup>5</sup>

The appointment, and the acceptance thereof by the agent, is in the following form:—

#### COMMONWEALTH OF MASSACHUSETTS.

*Essex*, ss.

PROBATE COURT.

Know all men, that I, *Andrew Eaton*, of *Portland*, in the State of *Maine*, appointed by said court administrator of the estate [or, *de bonis non*] of *Thomas Brown*, late of *Boxford*, in said county of *Essex*, farmer, deceased, under and in compliance with the provisions of the statutes of said Commonwealth, do hereby appoint *John Andrews* of *Boxford*, in the county of *Essex*, and Commonwealth aforesaid, as my agent, and I do hereby stipulate and agree that the service of any legal process against me as such administrator, if made on said agent, shall be of the same legal effect as if made on me personally within said Commonwealth.

In witness whereof, I have hereunto set my hand and seal

<sup>1</sup> St. 1893, c. 118.

<sup>2</sup> P. S., c. 132, §§ 8, 9.

<sup>3</sup> P. S., c. 132, § 10.

<sup>4</sup> P. S., c. 132, § 11.

<sup>5</sup> P. S., c. 132, § 12.

this *seventh* day of *April*, in the year of our Lord one thousand eight hundred and ninety-*six*.

Signed, sealed and delivered,  
in presence of

*John Jones.*

*Andrew Eaton.*

I, the above-named *John Andrews*, hereby accept the above appointment.

*John Andrews,*

[Address] *Boxford, Mass.*

This must be filed in the registry of probate.

#### NOTICE OF APPOINTMENT.

After the approval of the bond, there is issued to the administrator a letter of administration, which is his commission to act in the settlement of the estate. He must within three months thereafter give notice of his appointment by posting notices thereof in two or more public places in the city or town in which the deceased last dwelt.<sup>1</sup> The following is the required form of such notice:—

Notice is hereby given that the subscriber [or, -s] has [or, *have*] been duly appointed administrator [or, -rix] of the estate of *Thomas Smith*, late of *Salem*, in the county of *Essex*, *merchant* [or, *widow*, or, *singlewoman*], deceased, intestate, and has [or, *have*] taken upon himself [or, *herself*; or, *themselves*] that trust by giving bond\*, as the law directs.

All persons having demands upon the estate of said deceased are required to exhibit the same, and all persons indebted to said estate are called upon to make payment to *the subscriber* [or, *to said agent*].

(Address) *11 Essex Street,*

*John Smith, Adm.*

*Salem, Mass., Dec. 10, 1892.*

<sup>1</sup> P. S., c. 132, § 1. This is also administrators *de bonis non*. true in cases of appointment of

If the administrator lives without the common wealth, and an agent has been appointed, insert in the notice at the asterisk (\*) the words, "and appointing *Judas Allen of Salem, in said county of Essex*, his agent."

If the deceased was a man of extensive business interests, and it is probable that the fact of the appointment would not, by the posted notices alone, become known to the people in other places with whom he transacted business, a like notice should be published in some newspaper. In all cases the order of notice contained in the administrator's letter of appointment must be followed, as the court has power and may direct even a different way of giving notice. The statute is as follows:—

Every administrator shall, within three months after giving bond for the discharge of his trust, cause notice of his appointment to be posted in two or more public places in the city or town in which the deceased last dwelt; or he may be required by the probate court to give notice by publication in some newspaper, or in such other manner as the court, taking into consideration the business of the deceased and the circumstances of his estate, may direct.<sup>1</sup>

If by accident or mistake the notice of the appointment was not duly given within three months from the date of appointment, or, if the evidence that it was given fails to be duly perpetuated, the court will issue a decree ordering such notice anew,<sup>2</sup> upon a petition in the following form:—

<sup>1</sup> P. S., c. 132, § 1.

<sup>2</sup> P. S., c. 132, § 3.

To the Honorable the Judge of the Probate Court in and for the county of *Essex* :

Respectfully represents *John Smith*, administrator of the estate of *Thomas Smith*, late of *Salem*, in said county of *Essex*, deceased, intestate, that on the *tenth* day of *January*, A. D. 1896, he gave bond for the faithful discharge of his said trust, and that by accident and mistake the notice of his appointment was not given within three months from said date: wherefore he prays that he may be ordered to give said notice within such further time as the court may order.

Dated this *twentieth* day of *April*, A. D. 1897.

*John Smith.*

If no notice of appointment was given at first, the statute of limitations begins to run at the date of the second order of notice.<sup>1</sup>

*Proof that the Notice was Given.*

The fact of posting notice of appointment may be proved orally<sup>2</sup> or otherwise.<sup>3</sup>

In order to prove that such a notice was published in a newspaper, pursuant to the order of the court, it is sufficient to produce the newspaper itself containing such notice, without showing the newspaper to be genuine, provided there is no evidence to impeach its genuineness.<sup>4</sup>

The facts, that the probate court issued an order requiring an administrator to give notice of his appointment by advertising in a newspaper and by posting up notifications, and that he advertised in the newspaper, are not competent evidence for a jury to presume that he posted up notifications.<sup>4</sup>

<sup>1</sup> P. S., c. 132, § 3.

<sup>3</sup> *Estes v. Wilkes*, adm'r, 16 Gray

<sup>2</sup> *Green v. Gill*, ex'r, 8 Mass. 111 363 (1860).

(1811); *Henry v. Estey*, adm'r, 13 Gray 336 (1859).

<sup>4</sup> *Hudson v. Hulbert*, 15 Pick. 423 (1834).



Immediately after the notice ordered is fully given an affidavit of the fact should be made by the administrator or by some one who knows the fact, and in form acting for him, and filed in the probate court, together with a copy of the notice. Such affidavit and copy being filed and recorded in the registry of probate is admissible as evidence of the time, place and manner in which the notice was given.<sup>1</sup>

The following is the form of the affidavit of having given such notice :—

I, *John Smith* (or, *I, Andrew Jones, employed by John Smith to give such notice*), do testify and say that I gave notice of *my* (or, *his*) appointment to and acceptance of the trust of administrator of the estate of *Thomas Smith*, late of *Salem*, in the county of *Essex, farmer*, deceased, within three months from the *first* day of *March*, A. D. 1897, the time of said appointment, by causing notifications thereof to be posted in public places in said *Salem*, on the *third* day of *March*, A. D. 1897 [by<sup>2</sup> publishing a notification thereof once in each week for three successive weeks, in the *Salem Gazette*, a newspaper published in said *Salem*, commencing on the *fourth* day of *March*, A. D. 1897], and the following is a true copy thereof, viz.:

Notice is hereby given that the subscriber has been duly appointed administrator of the estate of *Thomas Smith*, late of *Salem*, in the county of *Essex, farmer*, deceased, intestate, and has taken upon himself that trust by giving bond, as the law directs. All persons having demands upon the estate of said deceased are required to exhibit the same; and all persons indebted to said estate are called upon to make payment to *the subscriber*.

(Address) *11 Essex Street,*  
*Salem, Mass., March 2, 1897.*

*John Smith, Adm.*  
*John Smith, Adm.*

<sup>1</sup> P. S., c. 132, § 2, amended by St. 1888, c. 148, § 1, and St. 1888, c. 380. such publication was ordered and made. If not, erase it.

<sup>2</sup> Insert this clause in brackets if

*Essex*, ss. *April 16*, A. D. 1897. Personally appeared *John Smith* and made oath that the foregoing affidavit by him subscribed is true.

Before me, *Andrew Quinn*, Justice of the Peace.

Though this affidavit may be filed at any time in the probate court, it should be filed immediately after the notice is given, as titles to real estate depend upon it, and delays often cause annoyance and loss of evidence.

In cases when administrators, or the persons employed by them to give notice of appointment, or notice of sale of real estate, have failed to file in the probate court an affidavit of such notice, and such affidavit cannot be obtained, the probate court may, upon petition of any person interested in real estate the title to which may be affected thereby, setting forth the particular failure complained of and averring that the affidavit cannot now be obtained, order notice by publication to creditors of, and others interested in, the estate in the settlement of which the failure complained of occurred.<sup>1</sup>

Upon return of such notice and after hearing, if the court is satisfied that notice was in fact given, it may make a decree to that effect.<sup>2</sup>

## RESIGNATION AND REMOVAL OF ADMINISTRATORS.

### *Resignation.*

If, after his appointment and qualification, an administrator wishes to resign he has that liberty, providing that it appears to the court to be proper to

<sup>1</sup> St. 1889, c. 315, § 1.

<sup>2</sup> St. 1889, c. 315, § 2.

allow him to do so.<sup>1</sup> The following is the conventional form of such resignation :—

To the Honorable the Judge of the Probate Court in and for the County of *Essex* :

Respectfully represents *John Smith*, that it is inconvenient for him any longer to serve as *administrator of the estate of Thomas Smith, late of Salem, in said county of Essex, deceased*. He therefore respectfully resigns said trust, and asks to have his resignation accepted.

Dated this *eleventh* day of *March*, A. D. 1893.

*John Smith.*

The court will thereupon make an order that the resignation be accepted, or, not accepted.

### *Removal.*

Death may cause the termination of the execution of an administrator's duty in the settlement of an estate ; or, he may be removed by the court at any time for cause, as for disobedience to lawful orders of the court, or, when he becomes insane, or evidently unsuitable or incapable of discharging the trust.<sup>2</sup>

An administrator will not be removed, as evidently unsuitable for the discharge of his trust, simply on proof that he was unsuitable at the time of his appointment, and without proof that he continues to be so. But he may be removed as evidently unsuitable for the discharge of his trust at the time when the petition for his removal is heard, although the same facts which render him unsuitable existed at the time of his appointment.<sup>3</sup>

<sup>1</sup> P. S., c. 132, § 16.

<sup>3</sup> *Drake v. Green*, 10 Allen 124 (1865).

<sup>2</sup> P. S., c. 132, § 14.

It is no cause for the removal of an administrator that he declines to inventory, or commence proceedings to recover (for the benefit of the heirs), certain real estate formerly belonging to the deceased, but which had been set off on execution against him in his lifetime, issued upon a judgment alleged by the heirs to have been recovered by the fraud of the plaintiff therein.<sup>1</sup>

But if creditors of an insolvent estate request the administrator to inventory real estate fraudulently conveyed by the intestate, offering to indemnify him, his refusal to do so is good cause for removal.<sup>2</sup>

A creditor of an insolvent deceased person, who has not proved his claim before the commissioners, may bring a petition for the removal of the administrator on the ground of embezzlement.<sup>3</sup>

The following is the form of the petition for the removal of an administrator:—

To the Honorable the Judge of the Probate Court in and for the County of *Essex* :

Respectfully represents *Henry Mason* of *Essex*, in the county of *Essex*, that he is an *heir at law* [or, a *creditor* ; etc.] of *Thomas Walters*, of *Methuen*, in said county of *Essex*, *farmer, deceased*, and is interested in the estate of said *Thomas Walters*; that by a decree of said court, dated the *nineteenth* day of *November*, A. D. 1890, *Warren Emerson* of *Groveland*, in the county of *Essex*, was appointed *administrator of the estate* of said *Thomas Walters*, and letters of *administration* were issued to him :

That said *Warren Emerson* has not taken an inventory of said estate [or, has taken no steps to collect claims due to the estate ;

<sup>1</sup> *Richards v. Sweetland*, 6 Cush. (1828). See P. S., c. 134, § 2. 324 (1850).

<sup>3</sup> *Brackett v. Williams*, 110 Mass.

<sup>2</sup> *Andrews v. Tucker*, 7 Pick. 250 549 (1872).

or, *has done nothing in the settlement of said estate ; etc.*], and is evidently unsuitable for the discharge of said trust.

Wherefore your petitioner prays that said *Warren Emerson* may be removed from his said office and trust.

Dated this *first* day of *March*, A. D. 1892.

*Henry Mason.*

Notice of this petition is given to the administrator by serving him with a copy thereof and a copy of the order of notice of the court thereon a certain number of days fixed by the court prior to the return day named therein. A return of such service must be made to the court.

The decree of the court granting the petition is in the following form :—

#### COMMONWEALTH OF MASSACHUSETTS.

*Essex*, ss.

At a Probate Court holden at *Salem*, in and for said county of *Essex*, on the *tenth* day of *March*, in the year of our Lord one thousand eight hundred and ninety-two.

On the petition of *Henry Mason*, praying that *Warren Emerson* may be removed from his office and trust as administrator of the estate of *Thomas Walters*, late of *Methuen*, in said county of *Essex*, farmer, deceased.

It appearing that due notice has been given to said *Warren Emerson*, according to the order of court; that the allegations set forth in said petition are true, and that said *Warren Emerson* is therefore evidently unsuitable for the faithful discharge of said trust:

It is decreed that said *Warren Emerson* be, and he is hereby removed from his said office and trust of administrator of said estate.

*John J. Trask*, Judge of Probate Court.

## INVENTORY.

An administrator is not bound to return an inventory until some property of the estate comes into his hands; <sup>1</sup> and then a reasonable time thereafter is allowed him in which to do so.<sup>2</sup>

He is obliged to return only one inventory.<sup>3</sup> If property subsequently comes into his hands he must account for it in the settlement of the estate, but need not inventory it.<sup>3</sup>

Ancillary administrators, as well as administrators generally, must return an inventory of the assets of the estate that are within this commonwealth.<sup>4</sup>

As a matter of course, the register of probate issues a warrant to one or three men to appraise the estate of the deceased at the time the letter of appointment is issued. Appraisers must be suitable and disinterested in the estate.<sup>5</sup> They cannot be heirs or sureties on the bond of the administrator. Three appraisers are ordinarily appointed, but if the estate is small the court or the register, may, whenever in their opinion the nature of the estate makes it advisable, appoint only one.<sup>6</sup> The names of the appraisers are ordinarily suggested to the judge or register by the administrator, the administrator bond blanks in present use having a space for that purpose upon their backs.

Appraisers for such a purpose may be appointed by a disinterested justice of the peace, but if so appointed they have no authority to appraise any estate without the county in which the justice resides.<sup>7</sup>

<sup>1</sup> *Walker v. Hall*, 1 Pick. 20 (1822).

<sup>4</sup> *Dawes v. Boylston*, 9 Mass. 337

<sup>2</sup> *Forbes v. McHugh*, 152 Mass. 412 (1812).  
(1890).

<sup>5</sup> P. S., c. 132, § 5.

<sup>3</sup> *Hooker v. Bancroft*, 4 Pick. 50

<sup>6</sup> St. 1897, c. 147.

(1826).

<sup>7</sup> P. S., c. 132, § 6.



The order of the justice of the peace appointing such appraisers must be substantially in the following form:—<sup>1</sup>

*Essex*, ss. To *Amos Waters, John Stone and Morrison Arthur*, all of *Amesbury*, in said county. You are hereby appointed to appraise on oath the estate and effects of *Thomas Smith*, late of said *Amesbury*, deceased, which may be in said county. When you have performed that service, you will deliver this order and your doings in pursuance thereof to *John Smith*, administrator of said deceased, that he may return the same to the probate court for the county of *Essex*.

Given under my hand this *second* day of *April*, in the year 1897. *James Ames*, Justice of the Peace.

Before entering upon their duties, all appraisers must be sworn to the faithful discharge thereof. The certificate of the oath should be attached to the warrant of appraisal, and be in form as follows:—

*Essex*, ss. *April 3*, A. D. 1897. Then<sup>2</sup> the above named appraisers personally appeared and made oath that they would faithfully and impartially discharge the trust reposed in them by the foregoing order. Before me,

*James Ames*, Justice of the Peace.<sup>3</sup>

Mortgages of real estate,<sup>4</sup> pecuniary legacies,<sup>5</sup> annually planted crops ready to be gathered at the time of the decease of the intestate,<sup>6</sup> the right of property

<sup>1</sup> P. S., c. 132, § 7.

<sup>2</sup> If the certificate is not under the order giving the names of the appraisers insert their names here, instead of the words, "the above named appraisers."

<sup>3</sup> If the appraisers are sworn by different justices make out separate certificates.

rate certificates.

<sup>4</sup> *Smith v. Dyer*, 16 Mass. 21 (1819); *Taft v. Stevens*, 3 Gray 504 (1855); *Steel v. Steel*, 4 Allen 417 (1862).

<sup>5</sup> *Osgood v. Foster*, 5 Allen 560 (1863).

<sup>6</sup> *Penhallow v. Dwight*, 7 Mass. 34 (1810).

which the deceased had in a trade secret of his own invention,<sup>1</sup> debts due to the deceased,<sup>2</sup> etc., are to be inventoried. If there is any specific personal property in the hands of the deceased, belonging to others which he holds in trust, or otherwise, and it can be clearly distinguished from the property of the deceased, it should not be inventoried; but if such property is not distinguishable from the mass of the testator's own property, the party owning it must come in as a general creditor of the estate, and the property itself is assets of the estate and is to be inventoried.<sup>3</sup> Property that can be recovered by an administrator, although the deceased could not do so, as property conveyed in fraud of creditors, should also be inventoried.<sup>4</sup>

It is the duty of the administrator to show, or cause to be shown to the appraisers the property of the estate. When appointed by the probate court, the appraisers must appraise all the property of the deceased within the commonwealth, but they have no authority to appraise property, either real or personal, that is without the state at the time of the death of the intestate.<sup>5</sup> When appointed by a justice of the peace, they cannot appraise any property without the county in which the justice appointing them resides. The fair market value at the time of

<sup>1</sup> *Peabody v. Norfolk*, 98 Mass. 452 (1829); *Holland v. Cruft*, 20 Pick. 321 (1868).

<sup>2</sup> *Hooker v. Olmstead*, 6 Pick. 481 (1828); *Leland v. Felton*, 1 Allen 531 (1861).

<sup>3</sup> See *Johnson v. Ames*, 11 Pick. 181 (1831).

<sup>4</sup> *Martin v. Root*, 17 Mass. 222 (1821); *Gibbens v. Peeler*, 8 Pick. 254 (1821); *Austin v. Gage*, 9 Mass. 395 (1812); *Hooker v. Olmstead*, 6 Pick. 481 (1828); *Wheelock v. Pierce*, 6 Cush. 288 (1850); *Morrill v. Morrill*, 1 Allen 132 (1861); *Richardson v. N. Y. Central R. R.*, 98 Mass. 85 (1867).

appraisal to the best of the judgment of the appraisers is what is required. Savings bank deposits should have the interest added to the time of appraisal; and property, either real or personal, encumbered by mortgage or otherwise, should be appraised at its entire value, deducting therefrom the amount of the encumbrance to the time of the appraisal, and returning in the inventory the amount of the balance, or equity, only, all the facts being given.

As to detail in taking an inventory, much depends upon what is intended to be done with the property. If it is to be sold at auction to pay debts, etc., the appraisal may be somewhat generalized or lumped. If the heirs intend to divide the property among themselves according to the inventory it should be made in detail. All lots of real estate, however, with the buildings thereon, if attached to the soil, should be appraised separately. Savings bank deposits should also be appraised separately, giving the name of the bank and the number of the book. Certificates of stock should also be separate, the number of shares and the number of the certificate being stated. Household furniture can be more or less generalized, any articles of special market value being appraised separately. Libraries ought to be appraised as a whole, and not book by book. If the deceased was a manufacturer, his business may be valued in one item; or it may be divided into machinery, materials, and manufactured goods on hand. If he was a partner in a firm his interest may be appraised in the aggregate. As to farm stock, cows may be lumped, giving the number of them and their aggre-

gate value. So with oxen, sheep, horses, etc. Farm machinery ought to be appraised separately, machine by machine ; but small farming implements should be lumped. Hay should be taken in a lump. So with the different kinds of grains. The different kinds of fruit and vegetables should be kept separate. Debts due to the estate, if of considerable size, should be inventoried separately, giving the name of the debtor and the nature and amount of the debt. Book accounts and small debts should be stated in a lump.

The inventory should always be made in two classes, one of personal property, and the other of real estate.

After the appraisal is taken a return must be made thereon by the appraisers in the following form:—

Pursuant to the foregoing order to us directed, we have appraised said estate as follows, to wit:

Amount of Personal Estate, as per schedule exhibited, \$1,000.00

Amount of Real Estate, as per schedule exhibited, \$11,000.00

<i>Amos Waters,</i>	} Appraisers.
<i>John Stone,</i>	
<i>Morrison Arthur,</i>	

The appraisers must then give the inventory thus completed to the administrator of the estate. The administrator must then make oath to the correctness and completeness of the inventory so far as he knows, and the certificate of such oath, in the following form, should be attached to the inventory :—

*Essex, ss. April 5, A. D. 1897. Then personally appeared John Smith, administrator of the estate of said deceased, and made oath that the foregoing is a true and perfect inventory of*

all the estate of said deceased,<sup>1</sup> that has come to his possession or knowledge. Before me,

*Amos Lamprey*, Justice of the Peace.

The administrator must file the inventory in the probate office within three months from the date of his appointment.<sup>2</sup> The appraisers must be paid by the administrator, who will be reimbursed from the estate when he settles his account. They are to have a just and reasonable compensation for their services, and the court may fix the amount.<sup>3</sup> If any doubt exists as to how much should be paid to appraisers the administrator should get the advice of the judge of the probate court before paying.

If the administrator fails or refuses to file an inventory of the estate within three months, upon the petition of any party interested in the estate, the court will compel the rendering thereof. The form of the petition, for this purpose, is as follows :—

To the Honorable the Judge of the Probate Court in and for the County of *Essex* :

Respectfully represents *Henry Peabody* of *Andover*, in the county of *Essex*, that by a decree of said court, made on the first day of *February*, A. D. 1897, *John Smith* of *Salem*, in the county of *Essex*, was appointed administrator of the estate of *Thomas Smith*, late of said *Salem*, merchant, deceased, and gave bond for the due performance of said trust, and that he has neglected to file an inventory as required by law and the condition of his bond.

Your petitioner further represents that he is a party interested in the due administration of said estate.

<sup>1</sup> If the appraisers were appointed by a justice of the peace, add here the words, " within said county."

<sup>2</sup> P. S., c. 132, § 5.

<sup>3</sup> St. 1886, c. 135.

Wherefore he prays that the said *John Smith* may be ordered to render to the court an inventory of said estate and an account of his administration thereof.

Dated this *tenth* day of *May*, A. D. 1897.

*Henry Peabody.*

The court will issue an order to the administrator, upon the receipt of such application, requiring him to render the inventory before a certain day named therein, or show cause for his failure to do so. This order is served<sup>1</sup> by giving the administrator in hand a copy of the same attested by the register. The return<sup>1</sup> on this order is in the following form:—

I have served the foregoing order on the above-named *John Smith* by giving him in hand an attested copy thereof.

*Henry Peabody.*

The return must be sworn to, and a certificate of such oath in the following form appended:—

*Essex*, ss. *May 11*, A. D. 1897. Personally appeared *Henry Peabody*, and made oath to the truth of the above return by him subscribed. Before me,

*Rufus Choate*, Justice of the Peace.

If the administrator refuses to obey the order of the court, or, if, after hearing, he fails to render an inventory, suit may be brought on his bond, and he may be removed from office.

If, after the inventory is duly taken and filed in the probate office, other property comes to the knowledge of the administrator, an additional inventory may be made, proceeding as at first. If the new property is money or its equivalent, the value of which is principally a matter of calculation, the bet-

<sup>1</sup> Any person can serve this order, and make the return.



ter way is to add it to the credit of the estate in his account when it is rendered to the court.

#### COLLECTION OF ASSETS, ETC.

The administrator must immediately proceed to discover and recover the assets of the estate ; and to pay the preferred claims against the estate if the assets appear to be sufficient therefor. He need not pay ordinary claims until he has had time to learn the condition of the estate and the amount of the claims against it, as no suit can be brought against him on such claims until a year from the date of the approval of his official bond. The year's time is given by the law that the administrator may have ample time to learn whether or not the estate is insolvent.

If any one, even the administrator himself, is suspected of having fraudulently received, concealed, embezzled or conveyed away any estate, real or personal, of the deceased, upon complaint made to the probate court by the administrator or heir, creditor or other person interested in the estate, the court may cite such suspected person to appear and be examined under oath upon the matter of the complaint. If the person so cited refuses to appear and to submit to examination, or to answer such interrogatories as may be lawfully propounded to him, the court may commit him to jail, there to remain in close custody, until he submits to the order of the court. The interrogatories and answers must be in writing, signed by the party examined, and filed in the court.<sup>1</sup> In such a case as this the complaint is in the following form :—

<sup>1</sup> P. S., c. 133, § 1.

To the Honorable the Judge of the Probate Court in and for the County of *Essex* :

*Jane Simons* of *Carlisle*, in the County of *Middlesex*, on oath complains that she has good cause to suspect, and does suspect, that *John Smith* of *Salem*, in the County of *Essex*, has fraudulently received, concealed, embezzled and conveyed away certain articles of personal property belonging to the estate of *Thomas Smith*, late of *Salem*, in the County of *Essex*, merchant, deceased, to wit: *one thousand dollars in cash* [or, *the library of the deceased*; or, *the horses of the deceased*; etc.]. That your complainant is *an heir* [or, *a creditor*; etc.] of said deceased,<sup>1</sup> and is interested in said estate.

Wherefore she prays that said *John Smith* may be cited to appear before said Court, to be examined upon oath upon the matter of this complaint, and that such further proceedings may be had in the premises as the law requires.

Dated this *first day of May*, A.D. 1897.

*Jane Simons.*

The complaint must be sworn to, and a certificate of the oath, in the following form, appended :—

*Essex*, ss.

*May 3*, A. D. 1897.

Then personally appeared *Jane Simons*, and made oath that the above complaint, by her subscribed, is true.

Before me, *Daniel Noyes*, Justice of the Peace.

The person suspected is cited by giving him a copy of the complaint and of the citation, both copies being attested by the register a certain specified number of days before the return day named therein. This citation may be served by any person; and any person having actual knowledge of the service may

<sup>1</sup> If the complainant describes himself as "administrator and creditor," and it appears that he is not entitled to act as administrator, the words "administrator and" are material and cannot be rejected as surplusage. *Arnold v. Sabin*, 4 Cush. 46 (1849).

make the required return, which is in the following form:—

I have served the foregoing citation as therein required.

*Amos Hanson.*

This return must be sworn to, and a certificate of the oath, in the following form, appended:—

*Essex, ss. May 3, A. D. 1897. Personally appeared Amos Hanson, and made oath to the truth of the above return by him subscribed. Before me,*

*Daniel Noyes, Justice of the Peace.*

So far as it relates to embezzlement or concealment of property of the estate by the administrator, the matter can be examined into when the matter of allowance of his account comes up in court.<sup>1</sup>

The remedy of a suit upon the official bond of the administrator can sometimes be resorted to.<sup>1</sup>

A judge of probate has authority to examine an administrator upon oath touching any obligation due from the administrator himself to the estate.<sup>2</sup>

An administrator may not only be examined, but evidence may be offered to disprove his answers.<sup>3</sup>

Resort must not be had to equity or a common law court in a case of this kind. The jurisdiction of the probate court is ample.<sup>4</sup>

To give the probate court jurisdiction under such a complaint, the estate must be in course of settlement in it, and not while an appeal from the

<sup>1</sup> *Selectmen of Boston, v. Boylston*,  
4 Mass. 318 (1808).

<sup>3</sup> *Higbee et al., v. Bacon, adm'r*,  
8 Pick. 484 (1829).

<sup>2</sup> *Higbee et al., v. Bacon, adm'r*,  
7 Pick. 14 (1828).

<sup>4</sup> *Wilson v. Leishman et al.*, 12  
Met. 316 (1847).

appointment of an administrator is pending in the supreme court.<sup>1</sup>

A party thus complained of may have the assistance of legal counsel.<sup>2</sup>

### *Neglect to Collect Assets.*

If an administrator unreasonably delays to raise money by collecting the debts and effects of the deceased, or by selling the real estate if necessary, or if he neglects to use in the payment of debts what money he has in his hands, and in consequence of such delay or neglect the estate of the deceased is taken on execution by the creditors, such delay or neglect is deemed to be unfaithful administration, and the administrator is liable in an action on his bond for all damages occasioned thereby.<sup>3</sup>

### *Debts Due from Heirs.*

A debt due from an heir to an estate may be set off against and deducted from such heir's distributive share; and on request the probate court must hear the parties and determine the validity and amount of such debt, and may make all decrees and orders that may be necessary or proper to carry such set-off or deduction into effect.<sup>4</sup>

### *Enforcing Delivery of Property by Administrators.*

When an administrator resigns his trust and neglects or refuses to deliver to his successor all the property held by him under his trust, the probate

<sup>1</sup> *Arnold v. Sabin*, 4 Cush. 46 (1849).    <sup>3</sup> P. S., c. 133, § 2.

<sup>2</sup> *Martin v. Clapp*, 99 Mass. 470    <sup>4</sup> P. S., c. 136, §§ 22, 23.  
(1868).

court may, upon the application of such successor or of any person beneficially interested, order such delivery to be made, and it has like powers for enforcing such order as are given to such courts by P. S., c. 156, § 15, for enforcing the delivery of property by an administrator who has been removed.<sup>1</sup>

#### PAYMENT OF DEBTS.

Suits of general creditors against an administrator cannot be brought within one year after the date of the approval of the bond of the administrator, nor after two years from the date of such approval,<sup>2</sup> except when new assets are received after the two years have elapsed,<sup>3</sup> and unless they are brought, after the estate has been represented insolvent, for the purpose of ascertaining a contested claim.<sup>2</sup> Suits may be brought within one year for preferred claims.<sup>4</sup>

Creditors should present their claims to the administrator within one year after the bond is approved, as after that time and before notice of such claims the administrator may proceed to pay in full the debts known to him, and be protected, though the estate is actually insolvent, and would have been so represented by him if he had had knowledge of such claims before he had paid any general debts.<sup>5</sup> If he so pays away the whole of the estate, he is not required to represent the estate insolvent, but will be discharged, in case suit is brought, by proving such payments.<sup>6</sup>

<sup>1</sup> P. S., c. 156, § 31.

<sup>2</sup> P. S., c. 136, §§ 1, 9.

<sup>3</sup> P. S., c. 136, § 11, which see; and, also, § 18.

<sup>4</sup> P. S., c. 136, § 1.

<sup>5</sup> P. S., c. 136, § 2.

<sup>6</sup> P. S., c. 136, § 3.

If, after paying all debts known to the administrator after the year has elapsed, there is a balance remaining in his hands, but it is insufficient to pay in full a claim of which he afterwards has notice, he is liable only for such balance. If there are two or more such demands exhibited, which together exceed the amount of assets remaining in his hands, he may represent the estate insolvent, and must, pursuant to such decree as the court may make in that behalf, divide and pay over what remains in his hands among such creditors as prove their debts under the commission of insolvency; but the creditors who have been previously paid are not liable to refund any part of the amount received by them.<sup>1</sup>

If it appears, upon the settlement of the account of an administrator, that the whole estate and effects which have come to his hands have been exhausted in paying the charges of administration and debts or claims entitled by law to preference over the common creditors of the deceased, such settlement is a bar to any action brought against such administrator by a creditor who is not entitled to such preference, although the estate has not been represented insolvent.<sup>2</sup>

If a right of action against an estate does not accrue within the two years, the creditor may present his claim to the probate court at any time before the estate is fully administered; and thereupon the court may order the administrator to retain in his hands enough assets to satisfy the same; unless a person interested in the estate offers to give bond to the alleged creditor with sufficient surety or sureties for the pay-

<sup>1</sup> P. S., c. 136, § 4.

<sup>2</sup> P. S., c. 136, § 5.



ment of his claim in case it is proved to be due, when the court may order such bond to be taken, instead of requiring assets to be retained.<sup>1</sup>

The statute of limitations begins to run anew against an administrator *de bonis non*, who duly gives notice of his appointment, unless two years had elapsed between the date of the approval of the bond of the original administrator and his death, resignation, or removal, if he had given due notice.<sup>2</sup>

*When Estates are Jointly Liable.*

When two or more persons are indebted on a joint contract, or on a judgment founded on such a contract, and either of them dies, his estate is liable therefor as if the contract had been joint and several, or as if the judgment had been against the deceased person alone.<sup>3</sup>

*Claims of Administrators against their Intestates.*

If an administrator has a claim against his intestate's estate, he can either pay himself the amount and ask to be allowed the payment in his account in the same manner as he would the claim of a third person. He cannot bring a suit for it, as other creditors can for their claims. The proper way for him to proceed is by petition to the probate court, praying that his claim be allowed, and upon that petition the final adjudication of his claim will be had.<sup>4</sup> The petition should be substantially in the following form :—<sup>5</sup>

<sup>1</sup> P. S., c. 136, § 13. See, also, §§ 14-16. <sup>4</sup> P. S., c. 136, § 6.

<sup>2</sup> P. S., c. 136, § 17.

<sup>3</sup> P. S., c. 136, § 8.

<sup>5</sup> The general blank petition should be used.

To the Honorable the Judge of the Probate Court in and for the County of *Essex*:

Respectfully represents *John Smith of Salem, in said county of Essex, that he is administrator of the estate of Thomas Smith, late of said Salem, machinist, deceased, and that he has a private claim against the estate of said deceased, to wit: For 14 months' labor performed for said deceased, at his request, from February 1st, 1893, to April 1st, 1894, at \$60 per month, . . . \$840.00*

*Wherefore your petitioner prays that said claim may be allowed against the estate of said deceased.*

*Dated this first day of January, A. D. 1896.*

*John Smith.*

The parties in interest may assent to this in the ordinary way by signing their names to a written assent at the bottom of the petition. If they do not, the court will order them served with notice, either by giving them in hand a copy of the citation issued thereon a certain number of days (fixed by the court and stated therein) before the return day stated therein, or, by publishing a copy of the citation in some newspaper (named therein) once a week for three successive weeks, the last publication to be one day at least before the return day.

The return of service of such citation is as follows:—

I have served the foregoing citation as therein ordered by duly delivering a copy thereof to each and every person interested [or, publishing].

*John Smith.*

This return must be sworn to, and a certificate of the oath attached.

The court will then proceed to examine the claim, and, if disputed, to give a hearing to the parties.

The decision of the probate court is final and conclusive.

The court may order the claim to be submitted to one or more arbitrators, to be agreed on by the administrator and the party objecting to the allowance of the claim. The court is not bound by the award of the arbitrators, they being simply assistant to the court, and it may at any time discharge the rule by which the claim is referred, may reject or disallow the award, or recommit the claim to the arbitrators, and also do such acts as may be done by courts of common law in cases referred by a rule of those courts. But the award of such arbitrators, if accepted by the probate court, is final and conclusive.<sup>1</sup>

Either party may appeal from the final decision of the probate court to the supreme court, in which a trial by jury may be had, an issue being made up under the direction of the court. The case is then tried before the jury as other civil actions are tried ; and the verdict thereon, when duly allowed and recorded, is conclusive.<sup>2</sup>

#### *Arbitration and Compromise of Claims.*

Besides the claims of administrators against the estate of their intestates, the probate courts may authorize administrators to adjust by arbitration or compromise any demands in favor of or against the estates of their intestates.<sup>3</sup>

The following is the form of the petition to the

<sup>1</sup> P. S., c. 136, § 6.

<sup>2</sup> P. S., c. 136, § 7.

<sup>3</sup> P. S., c. 142, § 12. This authority, relating to his intestate's estate. *Chadbourn v. Chadbourn*, 9 Allen 173 (1864).

mon law, of an administrator to submit to arbitration disputed claims

court for authority to compromise or arbitrate a claim :—

To the Honorable the Judge of the Probate Court in and for the County of *Essex* :

Respectfully represents *John Smith* of *Ayer*, in the county of *Middlesex*, administrator of the estate of *Ann Dover*, late of *Andover*, in the county of *Essex*, deceased, *single woman*, that there is a demand *against* (or, *in favor of*) the estate represented by him, as such administrator, of *Thomas Lincoln*, of *Cambridge, Mass.*, described as follows: *A claim for personal services amounting to two years' service in all etc. [or, a mortgage of personal property dated, etc.; etc.];* that it is probable the same can be adjusted by compromise on the following terms: *for one thousand dollars*; and it is for the interest of said estate that it be done, or that it be submitted to arbitration.

Wherefore he prays that he may be authorized to adjust said demand by compromise or submit it to arbitration.

Dated this *second* day of *November*, A. D. 1896.

*John Smith.*<sup>1</sup>

The decree will be made in the alternative.

The supreme court may authorize administrators to adjust by arbitration or compromise any controversy, that may arise between different claimants to the estate in their hands, to which arbitration or compromise such administrators, together with all other parties in being who claim an interest in such estate, are parties. An award or compromise made in writing in such case, if found by the court to be just and reasonable in its effects upon any future contingent interests in said estate, is valid and binding upon such inter-

<sup>1</sup> The administrator need not add body of the submission shows that the word "administrator" to his he is acting a such. *Chadbourn v. Chadbourne*, 9 Allen 173 (1864). signature to the submission if the

ests, as well as upon the interests of parties in being and when it appears that such future contingent interests may be affected, the court may appoint some suitable person or persons to represent such interests in such controversy, upon such conditions as to costs as to the court may seem equitable.<sup>1</sup>

Persons having only future contingent interests need not be made parties to an agreement of compromise if the court find that such agreement is just and reasonable in relation to its effects upon such interests.<sup>2</sup>

#### SALE OF PERSONAL ESTATE.

After the return of the inventory, upon application made by an administrator or by any person interested in the estate, the probate court may order a part or the whole of the personal estate of the deceased to be sold by public auction or private sale, as may be deemed most for the interest of all concerned; and the administrator must account for the property so sold at the price for which it sells.<sup>3</sup>

An administrator has the power of sale of personal estate by virtue of his appointment, the title in the same passing to him *ex officio*, but it is sometimes wise to have an order from the probate court to make such sale under the statute.<sup>4</sup> Sometimes in the transfer of stock it becomes necessary to obtain power from the probate court to do this. In either of these cases the following form of petition can be used:—

<sup>1</sup> P. S., c. 142, § 13.

<sup>2</sup> *Clarke v. Cordis et ali.*, 4 Allen 466 (1862).

<sup>3</sup> P. S., c. 133, § 3.

<sup>4</sup> *Hutchins, adm'r, v. State Bank* 12 Met. 421 (1847).

To the Honorable the Judge of the Probate Court in and for the County of *Essex* :

Respectfully represents *John Smith* of *Salem*, in the county of *Essex*, that he is interested as *administrator* [or, *heir*] in the estate of *Thomas Smith*, late of *Salem*, in said county of *Essex*, *merchant*, deceased; and that it will be most for the interest of all concerned in said estate that certain of the personal estate of said deceased, hereinafter named, to wit: *a certain building, standing at number 901 Washington street, in said Salem* [or, certain described shares of stock, giving number of certificate, number of shares, name of the corporation, etc.], should be sold at private sale or public auction.

Wherefore he prays that the *administrator* of said estate may be ordered by said court to sell said personal estate at private sale for a sum not less than *five hundred* dollars, or at public auction.

Dated this *first* day of *May*, A. D. 1897.

*John Smith.*

The parties interested in the estate can assent to the granting of the prayer of the petition by signing the following assent written under the petition:—

The undersigned, being all the persons interested, hereby assent to the foregoing petition.

If the parties in interest do not assent, and the petition is brought by the administrator, a citation will issue only upon special order of court. Such citation is ordinarily served by giving to each known party in interest in hand a copy of it (not attested), or by publishing as in citations for appointment of administrators. The return must state which method of service was adopted, as follows:—



I have served the foregoing citation as therein ordered by *duly giving to each known person interested a copy thereof* [or, *publishing*].

This return must be signed and sworn to as in the return on citations for the appointment of administrators, and a certificate of the oath attached.

A probate court, upon petition of an administrator, and after such notice to the parties interested as it may order, may, for the purpose of closing the settlement of an estate, license the administrator to sell and assign any outstanding debts and claims which cannot be collected without inconvenient delay. The sale must be conducted in such manner as the court, having regard, as far as it may think advisable or prudent, to the law in relation to sales of real estate by administrators, shall order.<sup>1</sup> A suit for the recovery of a debt or claim thus sold and assigned must be brought in the name of the purchaser. The fact of the sale must be set forth in the writ or declaration, and the defendant may avail himself of any matter of defence of which he could have availed himself in a suit brought by the administrator. Costs must be recovered by or against the plaintiff, and the administrator is not liable therefor. Such a suit brought upon a promissory note signed in the presence of an attesting witness, is not barred by the provisions of P. S., c. 197, if the suit could have been maintained by the administrator.<sup>2</sup>

#### MORTGAGES, ETC., HELD BY DECEASED.

When a mortgagee of real estate, or an assignee of such a mortgagee dies without having foreclosed the

<sup>1</sup> P. S., c. 133, § 4.

<sup>2</sup> P. S., c. 133, § 5.

right of redemption, the mortgaged premises and the debt secured thereby are considered as personal assets in the hands of his administrator, and must be administered and accounted for as such; and if the deceased has not in his lifetime obtained possession of the mortgaged premises, his administrator may take possession thereof by open and peaceable entry or by action, in like manner as the deceased might have done if living.<sup>1</sup> Upon the redemption of such mortgage the money paid therefor must be received by the administrator, and he must thereupon release and discharge the mortgage;<sup>2</sup> and until such redemption

<sup>1</sup> P. S., c., 133, § 6.

<sup>2</sup> The heirs of a mortgagee, as such, have not such an interest in the mortgage as entitles them to enter, or to have an action for condition broken. *Smith et al. v. Dyer*, 16 Mass. 18 (1819).

If a testator, after the making of his will, takes a bond and mortgage and enters for condition broken, but dies before foreclosure, the heirs at law are not entitled to the mortgaged premises as real estate purchased subsequently to the making of the will, but the debt goes to the executor as personal estate, and he may collect it or may assign it, together with the mortgage. *Dewey v. Van Deusen*, 4 Pick. 19 (1826); *Fay et al. v. Cheney*, 14 Pick. 399 (1833).

The administrator of a mortgagee, who during his lifetime recovered a conditional judgment on a writ of entry to foreclose the mortgage, may maintain a writ of entry against a disseizor to recover possession of the mortgaged premises. *Richardson v. Hildreth*, 8 Cush. 225 (1851).

An administrator of a mortgagee of real estate who has obtained judgment and possession for foreclosure

can maintain trespass against an heir at law of the mortgagee, for cutting and carrying away wood and timber from the mortgaged premises. *Palmer, adm'r, v. Stevens et al.*, 11 Cush. 147 (1853).

A quit-claim deed from the heir of a deceased mortgagee, made before a decree of distribution, though before the foreclosure of the mortgage, does not give the grantee sufficient title to sustain a writ of entry, even against the heir, being in occupation of the land. *Taft et al. v. Stevens*, 3 Gray 504 (1854).

Where heirs of a deceased mortgagee made a peaceable entry to foreclose the mortgage, and so held it for eight years, when an administrator was first appointed on the petition of the mortgagor, it was held that the mortgagor could redeem, and the heirs must account for the rents and profits to the administrator, who must apply them to the mortgage debt. *Haskins v. Hawkes et al.*, 108 Mass. 379 (1871).

A mortgage is personal property, but when an administrator, after foreclosure, personally takes a release deed of the equity from the

the administrator, if possession has been taken either by himself or by the deceased, is seized of the mortgaged premises, in trust for the persons who would be entitled to the money if the premises had been redeemed.<sup>1</sup>

When an administrator recovers judgment for a debt due to the deceased, and levies the execution on real estate, he becomes seized of such real estate in trust for the persons who would have been entitled to the money if the judgment had been satisfied in money; and the estate so taken on execution is considered as personal assets in his hands; and if redeemed, the money must be received by the administrator, who must thereupon release the estate.<sup>2</sup>

Real estate held by an administrator in mortgage, or taken on execution by him, may, at any time before the right of redemption is foreclosed, be sold subject to such right, in the same manner as personal estate of a person deceased; and after such right has been foreclosed, it may be sold in the same manner as real estate of which the deceased died seized.<sup>3</sup> That is, the administrator can convey the land without license from court before the time of redemption has elapsed; but after the right of redemption has been lost by lapse of the time allowed therefor, it can be

mortgagor, it merges the absolute title in the administrator as such, and he takes no personal interest in the equity as real estate or otherwise. *Johnson et al. v. Bartlett et al.*, 17 Pick. 477 (1835).

<sup>1</sup> P. S., c. 133, § 7.

<sup>2</sup> P. S., c. 133, § 8.

<sup>3</sup> P. S., c. 133, § 9. An administrator cannot, by virtue of letters of ad-

ministration granted in another state, and without the confirmation of his appointment by the probate court in this commonwealth, assign a mortgage of land situated in this state. *Cutter v. Davenport*, 1 Pick. 81 (1822). See *Thomas v. LeBaron*, 10 Met. 403 (1845); *Baldwin v. Timmins*, 3 Gray 302 (1855).

conveyed by the administrator only under license from the probate court for the ordinary purposes of sales of real estate of the deceased, that is, when the last hour allowed for redemption terminates the character of the property instantly changes from personal to real estate. If land so held by an administrator in mortgage or on execution is not redeemed or sold as above provided, it shall be assigned and distributed to the same persons and in the same proportions as if it had been part of the personal estate of the deceased; and if upon such distribution the estate comes to two or more persons, the probate court may cause partition thereof to be made between them, in like manner as if it had been real estate held by the deceased in his lifetime.<sup>1</sup>

#### DUTIES OF SPECIAL ADMINISTRATORS.

A special administrator must collect all the personal estate of the deceased, and preserve the same for the executor or administrator when appointed, and for that purpose may commence and maintain suits, and he may sell such perishable and other goods as the court may order to be sold. If he is appointed by reason of delay in granting letters testamentary, the court may authorize him to take charge of the real estate of the deceased, or of any part thereof, and to collect the rents, make necessary repairs, and do all other things which it may deem needful for the preservation of such real estate and as a charge thereon. He must be allowed such compensation as the court may deem reasonable.<sup>2</sup>

<sup>1</sup> P. S., c. 133, § 10.

<sup>2</sup> P. S., c. 130, § 12.

A special administrator may, by leave of the probate court, pay from the personal estate in his hands the expenses of the last sickness and funeral of the deceased,<sup>1</sup> the expenses incurred by the executor named in the will of such deceased person in proving the same in the probate court or in sustaining the proof thereof in the supreme court,<sup>2</sup> and, after notice to all persons interested, such debts due from the deceased as the probate court may approve.<sup>3</sup>

Upon the granting of letters testamentary or of administration the powers of the special administrator cease, and he must forthwith deliver to the executor or administrator all the estate of the deceased in his hands; and the executor or administrator may be admitted to prosecute a suit commenced by the special administrator in like manner as an administrator *de bonis non* may prosecute a suit commenced by a former executor or administrator.<sup>4</sup>

A special administrator is not liable to an action by a creditor of the deceased, and the statute of limitations does not run during his service.<sup>5</sup>

#### DUTIES OF PUBLIC ADMINISTRATORS.

Every public administrator who gives a general bond must, at the first probate court held after the first day of January in each year, render an account under oath of all balances of estates then remaining in his hands.<sup>6</sup>

When such a bond is given the statute of limita-

<sup>1</sup> P. S., c. 130, § 15.

<sup>2</sup> St. 1884, c. 291.

<sup>3</sup> St. 1897, c. 199.

<sup>4</sup> P. S., c. 130, § 16.

<sup>5</sup> P. S., c. 130, § 17.

<sup>6</sup> P. S., c. 131, § 8.



tions begins to run at the date of the letters of administration.<sup>1</sup>

Public administrators may be licensed to sell real estate for the payment of debts, and perform other duties in a manner similar to ordinary administrators.<sup>2</sup>

After three years from the date of his appointment, the probate court may, if it appears to be for the interest of all concerned, authorize a public administrator to sell the real estate of the deceased, although such sale is not necessary for the payment of debts. In such a case, the procedure is the same as in ordinary administrators' sales of real estate for the payment of debts.<sup>3</sup>

When an estate has been fully administered by a public administrator, he must deposit the balance of such estate remaining in his hands with the treasurer of the commonwealth.<sup>4</sup>

Public administrators must render an account of their proceedings under each letter of administration at least once in each year. Upon a final settlement of an estate, if it appears that moneys remain in their hands, which by law should have been deposited with the state treasurer, the court must certify that fact and a statement of the amount so withheld to the treasurer, who, unless such deposit is made within one month after the receipt of such notice, must cause the bond of the administrator to be prosecuted for the recovery of such moneys.<sup>5</sup>

When a public administrator neglects to perform any duty incumbent upon him in relation to an es-

<sup>1</sup> P. S., c. 131, § 9.

<sup>2</sup> P. S., c. 131, § 10.

<sup>3</sup> P. S., c. 131, § 11.

<sup>4</sup> P. S., c. 131, § 12.

<sup>5</sup> P. S., c. 131, § 13.



tate, and there appears to be no heir entitled to such estate, the district attorney must, in behalf of the commonwealth, prosecute all suits, and do all acts necessary and proper to insure a prompt and faithful administration of the estate and the payment of the proceeds thereof into the state treasury; and if no heir has, within two years after the granting of letters of administration, appeared and made claim in the probate court for his interest in such estate, it is presumed that there is no such heir, and the burden of proving his existence is then upon the public administrator.<sup>1</sup>

When the total property of an intestate which has come into the possession or control of a public administrator is of less than twenty dollars in value (unless it is the balance of an estate received from a prior public administrator), such administrator must forthwith reduce all such property into money, not taking administration thereon, and deposit it, after deducting his reasonable charges and expenses, with the state treasurer,<sup>2</sup> who holds it for the benefit of any persons who may have legal claims thereon. Such claims may be presented to the state auditor at any time within one year from the date of such payment to the treasurer. The auditor must examine the claims and allow such as may be proved to his satisfaction, and forthwith, upon the expiration of said term of one year, must certify the same to the governor and council for payment of the whole of the claims, or such proportional part thereof as the funds deposited will allow.<sup>3</sup> He must, upon making such

<sup>1</sup> P. S., c. 131, § 17.

<sup>3</sup> St. 1883, c. 264.

<sup>2</sup> P. S., c. 131, § 18.

deposit, file with such treasurer a true and particular account, under oath, of all his dealings, receipts, payments and charges on account of the property from which the money so deposited proceeds, including the name of the intestate, if known to him, and the treasurer must forthwith deliver to him a receipt for such money.<sup>1</sup>

#### ALLOWANCE TO WIDOW AND CHILDREN.

The articles of apparel and ornament of the widow and minor children of a deceased person belong to them respectively.<sup>2</sup>

Such parts of the personal estate of a deceased person as the probate court, having regard to all the circumstances of the case, may allow as necessaries to his widow, for herself and for his family under her care, or, if there is no widow, to his minor children, not exceeding fifty dollars to any child, and also such provisions and other articles as are necessary for the reasonable sustenance of his family, and the use of his house and of the furniture therein for forty days after his death, cannot be taken as assets for the payment of debts or charges of administration.<sup>3</sup> This may be done at any time.<sup>4</sup>

The object of the allowance is to afford the family temporary support;<sup>5</sup> and if it is reasonable and necessary the court may allow the whole of the personal estate.<sup>6</sup> If there is no personal estate no allowance

<sup>1</sup> P. S., c. 131, § 19.

<sup>4</sup> *Lisk v. Lisk*, 155 Mass. 153 (1891).

<sup>2</sup> P. S., c. 135, § 1.

<sup>5</sup> *Washburn v. Washburn*, 10 Pick.

<sup>3</sup> P. S., c. 135, § 2. See, also, *Fel-* 374 (1830).

*lows v. Smith*, 130 Mass. 376 (1881).

<sup>6</sup> *Brazer v. Dean*, 15 Mass. 183 (1818).

can be made. An allowance has priority over every thing.<sup>1</sup>

The following is the form of the petition for an allowance :—

To the Honorable the Judge of the Probate Court in and for the County of *Essex* :

Respectfully represents *Sarah Jones* that *Amos Jones*, late of *Nahant*, in said county, whose estate is in course of settlement in said court, died possessed of personal estate; that she is his widow, and has under her charge a family consisting of *one child under seven years of age* [etc.].

Wherefore she prays that the court will allow her part of the personal estate of said deceased as necessities for herself and family under her care, in addition to the provisions and other articles by law belonging to her.

Dated this *tenth* day of *May*, A. D. 1897.

*Sarah Jones.*<sup>2</sup>

If the petition is for an allowance to minor children alone, where there is no widow, it should be brought by the legal guardian of such children, as the allowance can be legally paid only to such guardian, and the form changed accordingly, stating the fact of guardianship, that there is no widow, and giving the names and ages of the children.

No notice upon a petition for an allowance is required, except in case of special administration.<sup>3</sup>

Upon petition of the widow or of any of the children of the deceased, the probate court may, after notice to all parties interested, make a reasonable allowance out of the income of the estate, real or

<sup>1</sup> *Kingsbury v. Wilmarth*, 2 Allen 310 (1861).

<sup>3</sup> *Wright v. Wright*, 13 Allen 207 (1866).

<sup>2</sup> This may be signed by attorney.

personal, in the hands of a special administrator appointed on account of the pendency of a suit concerning the probate of a will, as an advancement for the support of such widow or children, not exceeding such portion of the income of the estate as they would be entitled to whether the will would finally be proved or not.<sup>1</sup> An appeal from a decree concerning such allowance does not prevent the payment of the sum decreed, if the petitioner gives bond to the special administrator, with sureties approved by the court, and conditioned to repay such sum if the decree is reversed.<sup>2</sup>

The court may make a second allowance to a widow, if the personal estate is not then exhausted.<sup>3</sup>

An appeal from a decree making an allowance to a widow may be taken by any person aggrieved therewith.<sup>4</sup>

The failure on the part of the administrator to pay over the allowance is a breach of his bond.<sup>5</sup>

#### ASSIGNMENT OF DOWER.

The jurisdiction of the probate court in the assignment of dower to a widow is limited to those cases where her right is not disputed by the heirs or devisees of her deceased husband.<sup>6</sup> If such dispute exists, recourse must be had to the common-law writ of dower.

Application must be made by petition to the court

<sup>1</sup> P. S., c. 130, § 13.

(1833); *Ward v. Ward*, 15 Pick. 511

<sup>2</sup> P. S., c. 130, § 14.

(1834).

<sup>3</sup> *Hale v. Hale*, 1 Gray 518 (1854).

<sup>5</sup> *Choate v. Jacobs*, 136 Mass. 297

See *Porter v. Porter, adm'r*, 165

(1884).

Mass. 157 (1896).

<sup>6</sup> P. S., c. 124, § 10.

<sup>4</sup> *Litchfield v. Cudworth*, 15 Pick. 23

in which the estate is being settled, and the power of such court extends to all the real estate of the deceased within the commonwealth.<sup>1</sup>

Within one year from the decease of her husband, she is the only person that can petition for such assignment; but after a year has elapsed any heir or devisee of the deceased, or any person having an estate in the lands subject to such dower right, or the guardian of any such heir, devisee or person may do so.<sup>1</sup>

The following is the form of the petition for assignment of dower:—

To the Honorable the Judge of the Probate Court in and for the County of *Essex*:

Respectfully represents *Ann Jones of Salem*, in said county, widow, that *Thomas Jones*, late of *Salem*, in said county of *Essex*, deceased, intestate, whose estate is settled in this court, died seized of certain lands in this Commonwealth: that<sup>2</sup> she is his widow and entitled to dower in said lands; that her right is not disputed by the heirs; and that the names and residences of all parties now interested therein are as follows:

NAME.	RESIDENCE.
<i>Harry Jones,</i>	<i>Boston, Mass.</i>
<i>John Jones,</i>	<i>Salem, Mass.</i>
<i>Mary Smith (wife of Joseph Smith),</i>	<i>Danvers, Mass.</i>
<i>Sarah Jones, of Salem, Mass., a minor, whose guardian is George Stone of Salem, Mass.</i>	
<i>James Jones, of Salem, Mass., a minor, who has no guardian.</i>	

<sup>1</sup> P. S., c. 124, § 10.

<sup>2</sup> If the petition is brought by an heir, devisee, or other person, describe the interest of the petitioner here, as heir, etc., and state that *Ann Jones* is the widow of the deceased, changing the rest of the petition accordingly.

Wherefore the petitioner prays that her dower<sup>1</sup> in said land may be assigned to her by said court, as provided by law.

Dated this *first* day of *April*, A. D. 1897.

*Ann Jones.*

If the parties in interest will do so, they should sign the following assent:—

The undersigned, being all the persons interested, hereby assent to the foregoing petition.

*Henry Jones,*

*John Jones,*

*Mary Smith,*

*George Stone, guardian.*

If part of the land of the deceased lies in common with others, and the widow wishes her dower set off in that also, she must have partition made by like proceedings required by P. S., c. 178, §§ 60, 61. This is done by annexing to the petition a description of such land, the deceased's share therein, and the names of the co-tenants, referring thereto in the petition just before the prayer, and varying the prayer accordingly.

If the parties in interest (which include co-tenants, if land is held in common, as above) do not assent to the petition in writing, the court must issue a citation to them. This is to be served either by delivering a copy of it to each person interested fourteen days at least before the return day named therein, or by publishing it in a newspaper named in the citation once in each week, for three successive weeks, the

<sup>1</sup> Insert here the prayer that the signed to her, etc., changing the rest dower of said *Ann Jones* may be as- of the prayer accordingly.



last publication to be one day at least before such return day. The return is made by any person who knows that the citation has been properly served, in the following form :—

I have served the foregoing citation as therein ordered by delivering to each person interested a copy thereof fourteen days at least before the return day named therein [or, by publishing].

*John Jones.*

This return must be sworn to, and a certificate of the oath in the following form attached:—

*Essex, ss. June 7, A. D. 1897.* Then personally appeared *John Jones*, and made oath to the truth of the above return by him subscribed.

Before me, *Ulysses Grant*, Justice of the Peace.

If there is any person interested who is a minor, having no legal guardian, the court will, of its own motion, or at the suggestion of any one, appoint a guardian *ad litem* to act for such minor. The following is the form of such appointment:—

#### COMMONWEALTH OF MASSACHUSETTS.

*Essex, ss.*

PROBATE COURT.

At a Probate Court holden at *Salem*, in said county, on the seventh day of *June*, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas, in the matter of *the petition of Ann Jones for assignment of her dower out of the estate of Thomas Jones, late of said Salem, deceased*, it appears that *James Jones of said Salem* is a minor, and interested in said case, and has no legal guardian, therefore *Roberts Robin of Marblehead*, in the county of *Essex*, is hereby appointed to act as guardian *ad litem* or next friend for such person, to represent his interest in said case.

*Grant M. Emery*, Judge of Probate Court.

The guardian *ad litem* should accept the appointment before entering upon his duties, as follows:—

I hereby accept the above appointment.

*Roberts Robin.*

His return is in the following form:—

Having fully examined and considered the matter of the above mentioned petition of *Ann Jones*, I hereby<sup>1</sup> assent to the assignment of dower made by the commissioners appointed by the court to make such assignment.

*Roberts Robin.*

In the decree of the court ordering the dower to be assigned three discreet and disinterested men will be appointed commissioners to appraise the real estate of the deceased and set off one-third of it in dower to the widow.<sup>2</sup> These commissioners are generally suggested by the petitioner, or his attorney, their names and residences being given to the court.

A warrant is then issued by the court to the commissioners in the following form:—

#### COMMONWEALTH OF MASSACHUSETTS.

*Essex*, ss.

PROBATE COURT.

[SEAL] To *Henry Slade, George Williams and Robert Jackson*, all of *Nahant*, in said County of *Essex*:

You are appointed commissioners to set off the dower of *Ann Jones*, widow of *Thomas Jones*, late of *Salem*, in said county, deceased, which she is entitled to in the lands of which he died seized in this Commonwealth.

First, being sworn, you will give notice to all persons interested of the time and place appointed by you for setting off said dower, and

<sup>1</sup> If the guardian *ad litem* does not assent he should so state here in his return to court. If he does assent he may sign the commissioners' return assenting thereto.

<sup>2</sup> P. S., c. 124, § 11.

You will set off to said widow, by metes and bounds, her dower in all the real estate of which said deceased died seized in this Commonwealth, if it can be so done without damage to the whole estate;

But if the estate out of which dower is to be assigned consists of a mill or other tenement which cannot be divided without damage to the whole, you will assign to said widow her dower of the rents, issues or profits thereof, to be had and received by her as tenant-in-common with the other owners of the estate.

You will cause all persons interested, who are satisfied with your doings, to certify the same on your report, and will return this warrant, with your doings thereon, as soon as may be, to said Probate Court.

Witness, *Grant M. Emery*, Judge of said Court, at *Salem*, this *seventh* day of *June*, in the year of our Lord one thousand eight hundred and ninety-seven.

*Jackson L. Ames*, Register.

The commissioners must be sworn to the faithful and impartial discharge of their duties, and a certificate thereof in the following form attached to the warrant:—

*Essex*, ss. *June 10*, A. D. 1897. Then personally appeared the three commissioners above named, and made oath that they would faithfully and impartially execute the duties assigned them by the foregoing warrant.

Before me, *Andrew Andrews*, Justice of the Peace.

In setting off dower the first act of the commissioners is to give reasonable notice to all persons interested of the time and place appointed by the commissioners for setting off the dower. Notice sent by mail is sufficient. Reasonable time should be given

The following is a form of such a notice:—

To *John Jones of Salem, Mass.* :—

You are hereby notified that the undersigned have been appointed by the probate court of the county of *Essex* commissioners to set off the dower of *Ann Jones*, widow of *Thomas Jones*, late of *Salem*, in said county, deceased, in the lands of which he died seized in this commonwealth. And that *June 15, 1897, at 10 o'clock in the forenoon, and the late residence of said deceased, in said Salem*, are the time and place appointed for setting off said dower, at which time and place you may be heard in relation thereto.

Dated this *tenth* day of *June*, A. D. 1897.

<i>Henry Slade,</i>	}	Commissioners.
<i>George Williams,</i>		
<i>Robert Jackson,</i>		

The next thing to be done is to appraise each tract of real estate separately, and then proceed to set off and assign to the widow one-third in value of all the real estate of the deceased within the commonwealth in which she is dowable. If the estate consists of a mill or other tenement that cannot be divided without injury to the whole, instead of setting a part of it off by metes and bounds, they must assign to her one-third of the rents, issues or profits thereof, to be had and received by her as tenant-in-common with the other owners of the estate.

The commissioners should consider the relations and situation of the widow and other parties in interest, and endeavor to make such division as will be most beneficial to each of the parties, and to satisfy all as nearly as they can. If possible, the widow should be allowed to remain in her home.

After having agreed among themselves as to the premises to be set to the widow, the commissioners must make a report of their doings under the warrant to the court, in writing, in the following form:—

To the Honorable the Judge of the Probate Court in and for the County of *Essex*:

Pursuant to your warrant to us directed, dated *June 7, A. D. 1897*, we, the commissioners therein named, having been first sworn, according to law, and given notice to all persons interested, as therein directed, have appraised all the real estate in this Commonwealth, of which *Thomas Jones*, late of *Salem*, in said county, died seized, as follows:<sup>1</sup>

<i>House and lot, No. 20 Courtland St., Salem, at.....</i>	<i>\$2,000</i>
<i>House lot, No. 3 Langdale St., Beverly.....</i>	<i>700</i>
<i>Fowler pasture, Danvers, 10 acres.....</i>	<i>250</i>
<i>Grist mill and mill lot, Boxford.....</i>	<i>2,700</i>
<i>Lot of land in Middleton, ten acres.....</i>	<i>350</i>

*The whole of the real estate at.....* *\$6,000*

*One-third of which is.....* *\$2,000*

*And we have assigned and set off to said Ann Jones, to have and to hold the same as tenant in dower for her life, the following described premises: A certain lot of land situate in said Salem, together with the dwelling house thereon, and bounded and described as follows, viz.: Bounded on the north by Courtland street fifty (50) feet, east by land of Samuel Hunt eighty (80) feet, south by land of William Allen fifty-one (51) feet, and west by land of Sarah Davis ninety-one (91) feet.*

[If the real estate of the deceased consists only of a house and lot, certain rooms and rights may be assigned to the widow, in the following form:—

*House and lot, No. 20 Courtland st., Salem, at \$2000. And*

<sup>1</sup> Dower is to be set off to the widow whether she has released dower in widow out of mortgaged lands, also. the mortgage or not.

*we have assigned and set off to said Ann Jones, to have and to told the same as tenant in dower for her life, the eastern half of said house, the right of passage between the street and that part of said house over said lot, the right to use the front and rear doors and the hallways in common with the occupants of the other half of the house, and the eastern half of the cellar.]*

[If the real estate of the deceased consists only of a mill, etc., which cannot be divided without damage to the whole, one-third of the profits should be assigned to the widow, in the following form:—

*Grist mill and mill lot in Boxford, \$2700. And we have assigned and set off to said Ann Jones, to have and to hold the same as tenant in dower for her life, one-third of the rents, issues and profits of said grist mill and mill lot.]*

<i>Henry Slade,</i>	} Commissioners.
<i>George Williams,</i>	
<i>Robert Jackson,</i>	

The undersigned, being all persons interested in the foregoing report, hereby assent thereto, and request that the same be confirmed without further notice.

*Henry Jones,*  
*John Jones,*  
*Mary Smith,*  
*George Stone, guardian,*  
*Roberts Robin, guardian ad litem.*

If the report is not assented to by the widow or other parties interested she and they must be cited to appear and show cause why it should not be allowed and confirmed.

The decree of the court will be that the report be accepted, and that the land therein set off and described as and for the dower of said *Ann Jones* be assigned to her to have and to hold the same as tenant in dower.



If part or all of the lands of the deceased are held in common with other persons, the court may order in the warrant that the lands thus held be divided among the different owners according to their proportionate parts, and the commissioners will then proceed to assign dower out of the part set off to the estate of the deceased and the rest of his real estate as though no part had been owned in common with other persons. Or, so much of such land held in common as may be necessary to the assignment of dower may be ordered to be divided.<sup>1</sup> If it will not be necessary for the assignment of dower to assign any part of lands held in common to the widow as dower, the petitioner need not ask for partition among the tenants in common; but the commissioners can appraise the interest of the deceased in such lands as a part of his real estate, and assign the dower out of other lands of the deceased.

If partition among the tenants in common is made by the commissioners, such partition should occupy the first place in the report of the commissioners to the court, and be in the form substantially of the report of commissioners to make partition among tenants in common. The report can then proceed in the form above given, treating that portion of the real estate set off to the estate of the deceased as part and parcel of the same.

#### ASSIGNMENT OF HOMESTEAD.

Where a homestead right has been acquired under the statute, the probate court has jurisdiction in set-

<sup>1</sup> P. S., c. 124, § 18.

ting it off,<sup>1</sup> if the right is not disputed by the heirs or devisees.<sup>2</sup>

The widow, or guardian of the minor children who have such right of homestead, or any party interested in the estate, may petition for its assignment, in the following form :—

To the Honorable the Judge of the Probate Court in and for  
the County of *Essex* :

Respectfully represents *Ann Jones*<sup>3</sup> of *Salem*, in said county of *Essex*, widow, that *Thomas Jones*, late of *Salem*, in said county of *Essex*, merchant, deceased, intestate, whose estate is settled in this court, died seized of certain lands in this Commonwealth; that she is his widow, and entitled to an estate of homestead in said lands; that her right is not disputed by the heirs; and that the names and residences of all parties now interested therein are as follows:

*Henry Jones*, *Topsham*, *Mass.*

*Amos Adams*, *Oxden*, *Maine.*

*Thomas Jones*, *Salem*, *Mass.*, whose guardian is *Ann Jones*,  
the petitioner.

*Ann Jones*, *Salem*, *Mass.*, the petitioner.

Wherefore she prays that her estate of homestead in said lands may be assigned to her by said court, as provided by law.

Dated this *first* day of *January*, A. D. 1890.

*Ann Jones.*

The following is the form of assent to the petition:—

The undersigned, being the only persons interested, hereby assent to the foregoing petition.

*Henry Jones*,

*Amos Adams*,

*Ann Jones*, guardian.

<sup>1</sup> P. S., c. 123, § 9.

<sup>3</sup> If the petition is brought by a

<sup>2</sup> *Lazell v. Lazell*, 8 Allen 575 (1864); guardian, change the form accordingly.

*Woodward v. Lincoln et al.*, 9 Allen 239 (1864).

If all parties in interest do not assent, notice must be given to them as in setting off dower, and return made thereon under oath, etc.

The court will make a decree that the homestead be set off, and in the decree will appoint three commissioners to make the assignment. Their commission is as follows:—

COMMONWEALTH OF MASSACHUSETTS.

*Essex*, ss.

PROBATE COURT.

[SEAL]

To *John Johnson, Thomas Thomas and Frank A. Adams, all of Salem, in said county of Essex:*

You are appointed commissioners to set off an estate of homestead to *Ann Jones*, widow of *Thomas Jones*, late of *Salem*, in said county, deceased.

First, being sworn, you will give notice to all persons interested of the time and place appointed by you for setting off said homestead, and you will set off to said widow, by metes and bounds, an estate of homestead to the extent in value of eight hundred dollars in the lot of land and buildings thereon owned or rightly possessed and occupied as a residence by said deceased.

You will cause all persons interested, who are satisfied with your doings, to certify the same on your report, and will return this warrant, with your doings thereon, as soon as may be to said Probate Court.

Witness, *Ralph N. Stone*, Esquire, Judge of said Court, at *Salem*, this *first* day of *January*, in the year of our Lord one thousand eight hundred and ninety.

*A. M. Appleton*, Register.

The commissioners must be sworn to faithfully and impartially perform their duties, and a certificate of such oath attached to the warrant in the following form: —

*Essex*, ss. *Jan. 17*, A. D. 1890. Then personally appeared the three commissioners above named, and made oath that they would faithfully and impartially execute the duties assigned them by the foregoing warrant.

Before me, *Severn Anders*, Justice of the Peace.

The commissioners must fix upon a time and place<sup>1</sup> for setting off the homestead, and reasonable notice given of such time and place to all parties interested, as in assigning dower. The commissioners, at the time and place assigned, should proceed to set off such part of the real estate as in their opinion is worth eight hundred dollars. They need not appraise the whole estate as in dower, although they should be cognizant of the whole.<sup>2</sup> Their return should be in the following form:—

To the Honorable the Judge of the Probate Court in and for the County of *Essex*:

Pursuant to your warrant to us directed, dated *January 1*, A. D. 1890, we, the commissioners therein named, having been first sworn, according to law, and given notice to all persons interested as therein directed, have appraised and set off to *Ann Jones*, widow of *Thomas Jones*, late of *Salem*, in said county of *Essex*, merchant, deceased, an estate of homestead to the value of eight hundred dollars, bounded and described as follows: *A certain tract of land situate in said Salem, bounded northerly by land of Uriah Andri one hundred and ten (110) feet, easterly by land of Valentine Rowe one hundred and sixty (160) feet, southerly by Up street one hundred (100) feet, and westerly by other land of said deceased one hundred and fifty (150) feet,*

<sup>1</sup> The place ought to be somewhere on the premises, if convenient. homestead of the deceased, that the widow and children may not be com-

<sup>2</sup> As in assignment of dower, homestead should be assigned out of the homestead. pelled to leave their home.

*the last named line passing through the house which was the residence of said deceased, and including within the premises that part of the house which stands on the lot herein described.*

<i>John Johnson,</i>	} Commissioners.
<i>Thomas Thomas,</i>	
<i>Frank A. Adams,</i>	

The following is the form of the assent to the return :—

The undersigned, being all the persons interested in the foregoing report, hereby assent thereto, and request that the same be confirmed without further notice.

*Henry Jones,*  
*Amos Adams,*  
*Ann Jones, guardian.*  
*Ann Jones.*

If the parties interested, including those having the right of homestead, do not assent they must be cited as in dower. The decree will be that the report be accepted, and that the estate therein set off and described as and for the homestead of said *Ann Jones* [or, *the minor children*] be assigned to her to have and to hold as an estate of homestead.

When an estate of homestead exists in property in which other parties have an interest, the party entitled to the homestead, or any other party interested in such property, may have partition thereof like tenants in common.<sup>1</sup>

The homestead right of an insolvent person, when the estate in which the right of homestead exists is of greater value than eight hundred dollars, may be set off by the court, who shall cause the property to

<sup>1</sup> P. S., c. 123, § 11.

be appraised by three impartial and discreet men, one of whom must be appointed by the insolvent, one by the assignee, and the third by the court, and if the assignee or insolvent neglect to appoint, the court must appoint for him or them. The persons thus appointed must be sworn to faithfully and impartially appraise the property, and then proceed to appraise and set off the estate of homestead in the same to the debtor.<sup>1</sup> The appraisers are entitled to such fees as the court deems just and reasonable.<sup>2</sup>

#### ASSIGNMENT OF REAL ESTATE UNDER STATUTES.

##### *In Fee under P. S., c. 124.*

To set off the real estate of the deceased to the surviving husband or wife to the amount of five thousand dollars in fee, the surviving husband or wife or any other person interested in the estate may petition the probate court having jurisdiction of the estate of the deceased therefor.<sup>3</sup>

A widow cannot bring this petition after twenty years from the death of her husband, unless, at the time of her husband's decease she was absent from the commonwealth, under twenty-one years of age, insane or imprisoned, and the twenty years begins to run when such disability ceases.<sup>4</sup>

The following is the form of the petition : —

To the Honorable the Judge of the Probate Court in and for  
the County of *Essex* :

Respectfully represents *Ann Jones* of *Salem*, in the county of  
*Essex*, widow, that *Thomas Jones*, late of *Salem*, in said county

<sup>1</sup> P. S., c. 123, § 12.

<sup>3</sup> P. S., c. 124, § 17; amended by St.

<sup>2</sup> P. S., c. 123, § 12; St. 1886, c. 1889, c. 234.

<sup>4</sup> P. S., c. 124, § 14.



of *Essex, merchant*, deceased, intestate, leaving no issue living died seized of certain real estate in this Commonwealth, that *your petitioner* is his widow [or, *her husband*], and entitled to said estate in fee to an amount not exceeding five thousand dollars in value; and that the names and residences of all other persons now interested therein are as follows:—

Name.	Residence.
<i>John Stevens,</i>	<i>St. Louis, Mo.</i>
<i>Henry Jones,</i>	<i>Salem, Mass.</i>
<i>Amos Jones,</i>	<i>Danvers, Mass.</i>
<i>Sarah Adams, wife of John Adams, Cambridge, Mass.</i>	
<i>Samuel Jones, Salem, Mass., minor, Isaac Andrews, of Salem, guardian.</i>	

Wherefore she prays that said estate of said deceased, to an amount not exceeding five thousand dollars in value, may be assigned and set out to *her* in fee by said court, as provided by law.

Dated this *first* day of *March*, A. D. 1891.

*Ann Jones.*

The assent to this petition is in the following form:—

The undersigned, being all the persons interested, hereby assent to the foregoing petition.

*John Stevens,*  
*Henry Jones,*  
*Amos Jones,*  
*Sarah Adams,*  
*Isaac Andrews, guardian.*

Unless all parties in interest assent, they must be cited as in setting off dower, and an affidavit of such notice must be placed on file. If the deceased owned real estate in common with others, that fact should be stated in the petition at the asterisk (\*), and a request

should be made in the prayer that partition be made thereof, a description of such real estate, a statement of the deceased's share therein, and a list of the names and residences of such co-tenants being inserted in or annexed to the petition, as in setting off dower. The warrant will be issued by the probate court to three discreet and disinterested persons, as commissioners,<sup>1</sup> as in assignment of dower, in the following form :—

## COMMONWEALTH OF MASSACHUSETTS.

Essex, ss.

PROBATE COURT.

[SEAL] To *John Johnson, James Jameson and Jack Jackson,*  
all of *Salem, in said county:*

You are appointed commissioners to assign and set off in fee, by metes and bounds, to *Ann Jones*, widow of *Thomas Jones*, late of *Salem*, in said county, deceased, the real estate of which said *Thomas Jones* died seized in this Commonwealth, to an amount not exceeding five thousand dollars in value.

First, being sworn, you will give notice of the time and place appointed by you for making the assignment to all persons interested who are known and within the Commonwealth, and to the agent of any absent heir, appointed by the court, that they may be present. The names and residences of all parties interested are as follows:

*Henry Jones of Salem, Mass.*

*Amos Jones of Salem, Mass.*

*Sarah Adams, wife of John Adams, of Cambridge, Mass.*

*Samuel Jones of Salem, Mass., minor, whose guardian is Isaac*

*Andrews of Salem, Mass.*

*John Stevens, of St. Louis, Mo.*

You will appraise all said real estate, and you will make assignment thereof to the amount aforesaid, according to law.

<sup>1</sup> P. S., c. 124, § 11.

You will cause all parties who are satisfied with your doings to certify the same on your report, and make return of your doings, together with this warrant, as soon as may be, to this court.

Witness, *Antone Hubbard*, Judge of said Court, at *Haverhill*, this *first* day of *April*, in the year of our Lord one thousand eight hundred and ninety-one.

*Walter Griffin*, Register.

Before entering upon their duties the commissioners must be sworn to the faithful and impartial discharge thereof, and a certificate of the oath in the following form annexed to the warrant:—

*Essex*, ss. *April 3*, A. D. 1891. Then personally appeared the three commissioners above named, and made oath that they would faithfully and impartially execute the duties assigned them by the foregoing warrant.

Before me, *Gabrilla Adolph*, Justice of the Peace.

If any party is absent from the commonwealth the court will appoint an agent to act for him and care for his interests. This is done in the following form:—

#### COMMONWEALTH OF MASSACHUSETTS.

*Essex*, ss.

PROBATE COURT.

To *Moses I. Haskell* of *Peabody*, in said county.

In the matter of the assignment of the real estate of *Thomas Jones*, late of *Salem*, in said county, deceased, to the amount of five thousand dollars in fee to and on the petition of *Ann Jones*.

It appearing that *John Stevens* of *St. Louis, Missouri*, who is interested in the premises, is absent from this Commonwealth

you are appointed agent to act for said *John Stevens* in all things relating to said partition.

Dated this *first* day of *April*, A. D. 1891.

*Antone Hubbard*, Judge of Probate Court.

I hereby accept the above appointment.

*Moses I. Haskell.*

The commissioners proceed as in setting off dower, giving notice to all parties in interest, or their representatives, of the time and place of making the assignment, and then proceed to appraise the whole of the real estate and to set off five thousand dollars' worth thereof, by metes and bounds, if it can be done without injury to the residue, otherwise an undivided portion should be assigned.<sup>1</sup> Their return to the court should be in the following form :—

To the Honorable the Judge of the Probate Court in and for the County of *Essex* :

Pursuant to your warrant to us directed, dated *April 1*, A. D. 1891, we, the commissioners therein named, having been first sworn, according to law, and having given notice to all persons interested, as therein directed, have appraised all the real estate in this Commonwealth of which *Thomas Jones*, late of *Salem*, in the county of *Essex*, died seized, as follows: [Same as in dower, except that instead of assigning one-third of the real estate for life, real estate to the value of five thousand dollars is assigned and set off by metes and bounds in fee.

If partition of real estate in which the deceased had an interest has to be made, the return should first be devoted to that, as in assignment of dower.]

<i>John Johnson,</i>	} Commissioners.
<i>James Jameson,</i>	
<i>Jack Jackson,</i>	

<sup>1</sup> P. S., c. 124, § 17; St. 1889, c. 234.

The assent to the report is in the following form :—

The undersigned, being all the persons interested, hereby assent to the foregoing report, and request that the same be confirmed without further notice.

*John Stevens* (or, his agent),

*Henry Jones,*

*Amos Jones,*

*Sarah Adams,*

*Isaac Andrews, guardian of Samuel Jones.*

If the parties in interest do not consent to the report in writing, they must be cited.

The decree will be that the report be accepted and the assignment confirmed and established, and that the real estate be assigned as described, and set out to the widow therein named, in fee.

A certified copy of the return, with the decree thereon, should be recorded in the registry of deeds.

If the value of the whole of the real estate of which the deceased died seized does not exceed five thousand dollars, the court may itself assign and set out such estate without other notice than that on the petition, and without the assistance of commissioners.<sup>1</sup> The following is the form of the petition :—

To the Honorable the Judge of the Probate Court in and for the County of *Essex* :

Respectfully represents *Ann Jones*, of *Salem*, in the county of *Essex*, widow, that *Thomas Jones*, late of *Salem*, in said county of *Essex*, merchant, deceased, intestate, leaving no issue living, died seized of certain real estate in this Commonwealth; that *your petitioner* is his widow [or, *her husband*], and entitled to said estate in fee to an amount not exceeding five thousand

<sup>1</sup> St. 1894, c. 170.

dollars in value; that the entire real estate of the deceased consists of the following described parcels, namely: [Describe them by metes and bounds, and state where they lie].\*

And your petitioner further says that the whole of said real estate of the deceased, above described, does not exceed the value of five thousand dollars, as appears by the inventory filed in this court, being of the value only of *twenty-eight hundred* dollars, as your petitioner is prepared to verify; and that the names and residences of all other persons now interested therein are as follows: *John Stevens, St. Louis, Mo.; Henry Jones, Salem, Mass.; Amos Jones, Danvers, Mass.; Sarah Adams, wife of John Adams, Cambridge, Mass.; and Samuel Jones, Salem, Mass., minor, Isaac Andrews, Salem, Mass., guardian [or, having no guardian].*

Wherefore she prays that the whole of said estate of said deceased may be assigned and set out to her in fee by said court, as provided by law.

Dated this *first* day of *March*, A. D. 1895.

*Ann Jones.*

The assent to this petition is in the following form :

The undersigned, being all the persons interested, hereby assent to the foregoing petition.

*John Stevens,  
Henry Jones,  
Amos Jones,  
Sarah Adams,  
Isaac Andrews, guardian.*

If all parties in interest do not assent to this petition, they must be notified in such manner as the court may order, the general rule being the same as in assignment of dower; and an affidavit of the giving of such notice must be filed in the court.



If the deceased owned real estate in common with others, the fact should be stated in the petition at the asterisk (\*), and a request should be made in the prayer that partition be made thereof, a description of such real estate, a statement of the deceased's share therein, and a list of the names and residences of such co-tenants being inserted in or annexed to the petition, as in setting off dower.

The decree of the court will be in the following form:—

COMMONWEALTH OF MASSACHUSETTS.

*Essex*, ss.

At a Probate Court holden at *Salem*, in and for said county of *Essex*, on the *fourth* day of *April*, in the year of our Lord one thousand eight hundred and ninety-seven.

On the petition of *Ann Jones*, praying that there may be assigned and set out to *her* [or, *him*] in fee as widow [or, *husband*] of *Thomas Jones*, late of *Salem*, in said county of *Essex*, *merchant*, deceased, the whole of the real estate of which he died seized in this Commonwealth, the same not exceeding five thousand dollars in value.

All persons interested having been duly notified, and it appearing that said *Thomas Jones* died seized of real estate in this Commonwealth, that said *Ann Jones* is his widow, and entitled to said real estate in fee to an amount not exceeding five thousand dollars in value.

And it further appearing that the whole of the said real estate of the deceased is sufficiently described in said petition, and that it is therein alleged to be of less than five thousand dollars in value, and it appearing to the satisfaction of the court that the entire realty of which the deceased died seized in this Commonwealth does not in fact exceed the sum of five thousand dollars in value:

It is decreed that the whole of the said real estate of the said *Thomas Jones* be assigned to her, as prayed for, to wit: [Describe the real estate as in the petition].

To have and to hold to her, the said *Ann Jones*, and her heirs in fee.

*Asa B. Coit*, Judge of Probate Court.

*Life Interest, etc.*

After the widow's estate in fee of five thousand dollars in value has been assigned to her, in cases where she is entitled to it, she must petition the court to have half of the remainder of the real estate assigned to her for life, if she wishes it.

The widow may, instead of this life estate, claim her dower in the real estate not taken by her in fee by filing in the probate office, within six months after the date of letters of administration on her husband's estate, her election therefor.<sup>1</sup> Such evidence of choice on her part is in simple form, substantially as follows :—

I hereby certify that I elect to have my right of dower assigned to me out of the real estate of my husband, *Thomas Jones*, late of *Danvers*, in the county of *Essex*, deceased, not already assigned to me in fee under the statute, instead of my life estate therein, according to P. S., c. 124, § 3.

*Danvers, June 2, 1891.*

*Ann Jones.*

The probate court has jurisdiction in the assignment, if the heirs of her husband do not dispute her interest.<sup>2</sup>

The assignment of the life estate must be made by a proceeding separate from the first, though at the same

<sup>1</sup> P. S., c. 124, § 3.

<sup>2</sup> P. S., c. 124, § 10.

time. The widow is the petitioner; but if she fails to petition therefor within one year from the death of her husband, an heir or devisee of her husband, or any person having an estate in the lands subject to such interest, or the guardian of any such heir, devisee, or person, may bring the petition.<sup>1</sup> The form of such petition is as follows:—

To the Honorable the Judge of the Probate Court in and for the County of *Essex*:

Respectfully represents *Ann Jones*, of *Salem*, in said county, widow, that *Thomas Jones*, late of *Salem*, in said county of *Essex*, merchant, deceased, intestate, whose estate is settled in this court, died seized of certain lands in this Commonwealth; that she is his widow, and entitled, during her life, to one-half of his real estate other than that taken by her in fee; that her right is not disputed by the heirs or devisees; and that the names and residences of all persons now interested therein are as follows: [Follow the form used in setting off the estate in fee of five thousand dollars, in reference to names and residences of parties interested, and also where a portion of the real estate is held in common by the deceased with third parties].

Wherefore she prays that her said estate may be assigned to her by said court, as provided by law.

Dated this *first* day of *March*, A. D. 1891.

*Ann Jones.*

The assent to the petition of parties interested is given as in the case of setting off the estate in fee of five thousand dollars. If they do not assent, they must be cited, as in that proceeding. The warrant issued by the court to the petitioners is in the following form:—

<sup>1</sup> P. S., c. 124, § 10.

COMMONWEALTH OF MASSACHUSETTS.

*Essex*, ss.

PROBATE COURT.

[SEAL] To *John Johnson, James Jameson and Jack Jackson*, all of *Salem*, in said county.

You are appointed commissioners to set off to *Ann Jones*, widow of *Thomas Jones*, late of *Salem*, in said county, deceased, during her life, one-half of the real estate of which he died seized in this Commonwealth, other than that taken by her in fee.

First, being sworn, you will give notice to all parties interested of the time and place appointed by you for setting off one-half of said estate, and

You will set off to said widow, by metes and bounds, one-half of all the real estate of which said deceased died seized in this Commonwealth, other than that taken by her in fee, if it can be so done without damage to the whole estate.

But if the estate out of which one-half is to be assigned consist of a mill or other tenement which cannot be divided without damage to the whole, you will assign to said widow one-half of the rents, issues or profits thereof, to be had and received by her as a tenant-in-common with the other owners of the estate.

You will cause all persons interested, who are satisfied with your doings, to certify the same on your report, and will return this warrant, with your doings thereon, as soon as may be to said Probate Court.

Witness, *Robert Anderson*, Judge of said Court, at *Haverhill*, this *first* day of *March*, in the year of our Lord one thousand eight hundred and ninety-one.

*John Andrew*, Register.

Before entering upon the performance of their duties, the commissioners must be sworn, and a certificate of their oath in the following form filed in the court:—

*Essex*, ss. *March 8*, A. D. 1891. Then personally appeared the three commissioners above named, and made oath that they would faithfully and impartially execute the duties assigned them by the foregoing warrant.

Before me, *Aaron Stephens*, Justice of the Peace.

The commissioners must give notice to all parties interested of the time and place appointed by them for the performance of their duties, and then proceed as in the assignment of dower, except as to the proportion to be assigned. One-half of the real estate of the deceased which remains after the five thousand dollars' worth has been assigned to the widow in fee under a former warrant is what must be assigned, and this one-half for life only. The commissioners must make a return to the court, as in assignment of dower, proceeding, after the appraisal of all of the estate of which the deceased died seized in this commonwealth, to state what has been already assigned to the widow in fee to the amount of five thousand dollars under a former warrant. Then state that of this balance which is of an amount stated, "one-half thereof is hereby assigned to" the widow, naming her, "to have and to hold the same as tenant for her life, said one-half hereby assigned being described as follows." Then proceed to describe it by metes and bounds. This return must be subscribed by the commissioners; and should be assented to at the end of the return by all parties interested, as in assignment of dower. If all of such parties do not assent they must be cited. The decree of the court is similar to that in the assignment of dower.

*Under Deed of Jointure.*—When a widow is entitled by deed of jointure to an undivided interest in the real estate of her husband, either for life or during widowhood, if her right is not disputed by his heirs or devisees, she may have such interest assigned to her by this proceeding.

#### MORTGAGE OF REAL ESTATE TO PAY DEBTS, ETC.

The probate court having jurisdiction of the estate of a deceased person may on petition and after notice to all persons interested, if upon a hearing it appears to be for the benefit of such estate, authorize an administrator to mortgage any real estate of the deceased for the purpose of paying debts or charges of administration, or for the purpose of paying an existing lien or mortgage on the estate of the deceased; or it may authorize such administrator to make an agreement for the extension or renewal of such an existing mortgage.<sup>1</sup>

The petition is in the following form:—

To the Honorable the Judge of the Probate Court for the county of *Essex*.

Respectfully represents *John Smith*, administrator of the estate of *Thomas Smith*, late of *Salem*, in said county of *Essex*, physician, deceased, that said deceased died seized of the following described real estate, viz.: *A certain lot of land, with the buildings thereon, situate in said Salem, and bounded on the east by Jarow street, on the south by land of Abel Grant, on the west by land of Jowler Lonfrey, and on the north by Yellow lane, so called*;\* that he desires to mortgage the same to secure the sum of *fourteen hundred and fifty and 50-100* dollars, the amount necessary to be raised thereon for the following purposes, viz.:

<sup>1</sup> St. 1895, c. 140.



*for payment of debts and charges of administration [or, for the payment of the mechanics' lien upon said property of said amount; or, for the payment of a mortgage of said amount; etc.].*

Wherefore he prays that he may be authorized to mortgage said real estate for said purposes.

Dated this *first day of March*, A. D. 1896.

*John Smith.*

If the petition is brought for authority to make an agreement for the extension or renewal of an existing mortgage, the remainder of the petition after the asterisk (\*) should be left out and the following clauses inserted in its place :—

*That he desires to be authorized to make an agreement to extend [or, renew] a certain mortgage existing on said described premises for \$1450, held by Andrew Wheeler of said Salem, for three years from the first day of April, A. D. 1896, upon the same terms as the existing mortgage.*

Wherefore he prays that he may be authorized to make said agreement.

Dated this *first day of March*, A. D. 1896.

*John Smith.*

A list of the debts of the deceased should accompany the petition, if a mortgage is to be authorized to be raised to pay them. The following is the form of the list of debts :—

#### COMMONWEALTH OF MASSACHUSETTS.

*Essex*, ss.

PROBATE COURT.

Estate of *Thomas Smith*, late of *Salem*, in said County of *Essex*, deceased.

# ADMINISTRATION ON INTESTATE ESTATES. 173

A list of debts which appear to be due from said estate.

NAMES OF CREDITORS.	RESIDENCE OR P.O. ADDRESS.	NATURE OF DEBT.	SECURITY.	AMOUNT.
<i>Jas. Anderson,</i>	<i>Danvers, Mass.</i>	<i>Loan.</i>	<i>None.</i>	<i>\$150.00</i>
<i>William Jones,</i>	<i>15 Lemon St., Salem, Mass.</i>	<i>Labor.</i>	<i>"</i>	<i>26.50</i>
<i>John Adams,</i>	<i>Wenham, Mass.</i>	<i>Mdse.</i>	<i>Lien.</i>	<i>25.00</i>
<i>Henry Griffin,</i>	<i>Salem, Mass.</i>	<i>Nursing.</i>	<i>Chattel Mort.</i>	<i>29.00</i>
<i>E. L. Allen,</i>	<i>14 Alamode St., Salem, Mass.</i>	<i>Medical Attendance.</i>	<i>None.</i>	<i>110.00</i>
<i>Samuel How,</i>	<i>1 Berne St., Salem, Mass.</i>	<i>Undertak'g.</i>	<i>"</i>	<i>105.00</i>
<i>Moses Winter,</i>	<i>5 New St., Salem, Mass.</i>	<i>Groceries.</i>	<i>"</i>	<i>21.50</i>
<i>Anglo Chiol,</i>	<i>9 Meisle St., Salem, Mass.</i>	<i>Gravestone.</i>	<i>"</i>	<i>80.00</i>
<i>Thomas Aiken,</i>	<i>Andover, Mass.</i>	<i>Book Account.</i>	<i>"</i>	<i>578.50</i>
				<i>\$1,125.50</i>

Charges of administration, say..... *325.00*

Total..... *\$1,450.50*

*John Smith, Administrator.*

This list of debts must be sworn to, and a certificate of the oath, in the following form, filed therewith :—

*Essex, ss. March 1, A. D. 1896.*

Then personally appeared *John Smith*, and made oath that the foregoing statement, by him subscribed, is true to the best of his knowledge and belief.

Before me, *William L. Hill*, Justice of the Peace.

The representations of the administrator in neither the petition nor list of debts bind him to the stated amount of the claims, nor that the estate owes the

parties named, and he is free to contest the validity of either the whole or a part of each or all. The representation is made for the purpose of authorizing a sale of the real estate, and for no other purpose whatever can it be taken advantage of.<sup>1</sup>

The petition may be assented to in writing by all parties in interest, by subscribing their names to the following assent: "The undersigned, being all the persons interested, hereby assent to the foregoing petition." If this is not done they must be cited, by any person delivering a copy of the citation issued by the court upon the petition to each person interested fourteen days at least before the return day named therein, or by publishing the same once in each week for three successive weeks in the newspaper named therein, the last publication to be one day at least before such return day. Return must be made thereon under oath, as in the ordinary case, showing in which way the citation was served, the oath being to the truth of the return, and a certificate of the oath must be filed in the case.

The decree follows the prayer, and is general. It must fix the amount for which the mortgage may be given, the rate of interest, and may order a certain part of the principal to be paid from time to time from the income of the premises mortgaged.<sup>2</sup>

The mortgage may contain a power of sale, and must set forth the fact that it is made under license of court and the date of such license.<sup>3</sup>

If the bond of the administrator already on file is not, in the opinion of the court, large enough to cover

<sup>1</sup> P. S., c. 142, § 20.

<sup>3</sup> P. S., c. 142, § 6.

<sup>2</sup> P. S., c. 134, § 20.

the amount to be raised by the mortgage, the court may require an additional bond to be filed.<sup>1</sup>

#### SALE OF REAL ESTATE TO PAY DEBTS, ETC.

If the personal estate is insufficient to pay the debts of a deceased person, charges of administration, allowances, etc., the administrator must sell, under a license therefor from the probate court, a sufficient amount of the real estate to make up the deficiency.<sup>2</sup>

Before the court will order a sale of real estate for the payment of debts, an inventory of the estate must be filed. No license can be granted for such sale if any of the persons interested in the estate give bond to the administrator, in a sum and with sureties approved by the court, and with condition to pay, so far as the personal estate of the deceased shall be insufficient therefor, all debts therein mentioned that shall eventually be found due from the estate, and the charges of administering the estate.<sup>3</sup>

#### *At Public Sale.*

Lands of deceased persons may be sold under authority of the probate court for the payment of debts and charges of administration, if the personal estate, exclusive of the allowance to the widow, is insufficient therefor. All such sales are made subject to the rights of dower and homestead. The following is the form of the petition for this purpose:—<sup>4</sup>

<sup>1</sup> P. S., c. 143, § 4.

<sup>2</sup> P. S., c. 134, § 1.

<sup>3</sup> P. S., c. 134, § 10.

<sup>4</sup> P. S., c. 134, §§ 5, 6.

To the Honorable the Judge of the Probate Court in and for the county of *Essex* :

Respectfully represents *John Smith*, administrator of the estate of *Thomas Smith*, late of *Salem*, in said county of *Essex*, physician, deceased;

That the debts due from the deceased, as nearly as they can now be ascertained, as shown by the list herewith filed, amount to. .... \$1125.50

And the charges of administration to..... 325.00

Amounting in all to.....\$1450.50

That the value of the personal estate, in the hands of the petitioner (exclusive of the widow's allowance) is 000.00

That the personal estate is therefore insufficient to pay the debts of the deceased and the charges of administration, and it is necessary for that purpose to sell some part of the real estate to raise the sum of.... \$1450.50

\*That the real estate which the petitioner proposes to sell consists of the following parcels, to wit: *A certain lot of land, with the buildings thereon, situate in said Salem, and bounded on the east by Jarow street, on the south by land of Abel Grant, on the west by land of Jowder Longfey, and on the north by Yellow lane, so called; also, a certain lot of land situate in said Danvers, in said county of Essex, bounded north by Endicott street, east by land of Needham, south by land of John Porter, and west by land of Boston and Maine Railroad Company; and that by a partial sale thereof the residue would be greatly injured.*

Wherefore your petitioner prays that he may be licensed to sell the whole of said parcels at public auction for the payment of said debts and charges of administration.

Dated the *first* day of *March*, A. D. 1896.

*John Smith.*

The petitioner may ask to sell a sufficient part of the real estate to raise the sum required, but it is inad-

visible, as the property cannot be sold for an amount in the least beyond that desired to be raised, the decree of the court being insufficient therefor.

This petition must be accompanied by a sworn list of debts, as in petitions to mortgage the real estate of a deceased person to raise money to pay debts; and the petition may be assented to by the parties interested as in that proceeding, and if they do not assent they must have personal service of the citation issued by the court at least fourteen days before the return day named therein, or it must be published three weeks successively in the newspaper named therein.<sup>1</sup>

The court cannot grant the petition if any one interested in the estate gives a bond satisfactory to the court to the administrator, conditioned to pay, so far as the personal estate of the deceased shall be insufficient therefor, all debts mentioned in the petition that shall eventually be found due from the estate and charges of administration.<sup>2</sup>

The decree is "to sell at public auction the whole of said parcels of real estate," after finding "that it is necessary to sell some part of the real estate of said deceased, for the payment of his debts and charges of administration, the personal estate being insufficient therefor, and that by a partial sale thereof the residue of said parcels would be greatly injured."

A license is thereupon issued to the administrator.<sup>3</sup>

Notice of the time and place of the sale of the real estate thus authorized to be sold shall be given by causing notifications thereof to be posted, thirty

<sup>1</sup> P. S., c. 134, § 9.

<sup>3</sup> P. S., c. 134, § 11.

<sup>2</sup> P. S., c. 134, § 10.



days at least before the sale, in some public place in the city or town where the lands lie, and in two adjoining cities or towns, if there are so many in the county, or, if the court granting the license so orders, by publishing the notice three weeks successively in a newspaper.<sup>1</sup> The sale must take place within one year from and after the date of the decree.<sup>2</sup> The following is a form of a sufficient notice :—

*Administrator's Sale of Real Estate.*

By virtue of a license granted to me by the Probate Court for the County of Essex, dated April 2, 1896, will be sold at public auction, at the office of John E. Meader, auctioneer, 107 Northend street, in Salem, in said county, at 4 o'clock P. M., Saturday,<sup>3</sup> May 10, 1896, the following described real estate, viz.:—

A certain lot of land, with the buildings thereon, situate in said Salem, and bounded on the east by Jarow street, on the south by land of Abel Grant, on the west by land of Jowder Lonfrey, and on the north by Yellow lane, so called; also,

A certain lot of land situate in Danvers, in said county, bounded north by Endicott street, east by land of Needham, south by land of John Porter, and west by land of Boston and Maine Railroad Company.

Terms made known at sale.

*John Smith,*

Administrator of estate of Thomas Smith.

Salem, April 4, 1896.

An affidavit of the administrator, or of the person employed by him to give such notice, or of any one

<sup>1</sup> P. S., c. 134, § 12. The uniform practice now is to advertise the sale in a newspaper, and not to post the notices.

<sup>2</sup> P. S., c. 142, § 8; unless the sale is of land recovered under P. S., c. 134,

§ 15. See P. S., c. 142, § 18, for delivery of deed after a year.

<sup>3</sup> A notice is void if the day of the week and of the month do not agree. *Wellman v. Lawrence*, 15 Mass. 326 (1818).

who knows the facts, with a copy of the notice, should be filed in the probate office immediately after it is given as evidence of the same.<sup>1</sup> The following is the form:—

I do testify and say that†, being authorized by the Probate Court, for the County of Essex, on the *third* day of *April*, A. D. 1896, to make sale of the real estate hereinafter described of *Thomas Smith*, deceased, for the purposes in the license set forth, I gave public notice of the time and place of sale, by publishing a notification thereof, once in each week, for three successive weeks, in the *Salem Daily Gazette*, a newspaper published in *Salem*, commencing on the *fifth* day of *April*, A. D. 1896, and the following is a true copy of said notice:

[Paste here a copy of the notice cut from the newspaper.]

*John Smith.*

#### COMMONWEALTH OF MASSACHUSETTS.

*Essex*, ss. *May 3*, A. D. 1896. Then personally appeared *John Smith*, and made oath to the truth of the above affidavit by him subscribed.

Before me, *Samuel Jones*, Justice of the Peace.

The sale must be conducted by a duly licensed auctioneer. If at the time appointed for the sale the administrator deems it for the interest of all persons concerned that the sale should be postponed, he may adjourn it for a time not exceeding fourteen days, and notice of such adjournment must be given by a public declaration at the time and place first appointed for the sale. If the adjournment is for more than one day further notice of the sale must be given by

<sup>1</sup> P. S., c. 134, § 13, amended by St. 1888, c. 148, § 2, and St. 1888, c. 380. the affidavit, insert here the name of the affiant, and at the dagger (†) insert the name of the administrator.

<sup>2</sup> If the person employed by the administrator to give the notice makes

posting or publishing, as time and circumstances may admit.<sup>1</sup>

If the administrator is licensed to sell lands fraudulently conveyed by the deceased, or fraudulently held by another person for him, or lands to which the deceased had a right of entry, or of action, or of which he had a right to a conveyance, he may first obtain possession of such lands by entry or by action, and may sell the same at any time within one year after so obtaining possession. He may make a formal entry upon the premises, and bring the action on his own seizin acquired by such entry, demanding the land as administrator.<sup>2</sup>

After the sale of the property to the highest bidder, the administrator must give a deed of the lot or lots sold to the purchaser (or purchasers, if several lots are sold to two or more purchasers). The following is a form of the deed:—

Know all men by these presents, that whereas I, *John Smith*, of *Salem*, in the Commonwealth of Massachusetts, as administrator of the estate of *Thomas Smith*, late of said *Salem*, by virtue of a license granted to me on the *second* day of *April*, A. D. 1896, by the Probate Court for the County of *Essex*, in said Commonwealth, sold the real estate of the said deceased, hereinafter described, at public auction, on the *tenth* day of *May*, A. D. 1896, to *James Howie*, of said *Salem*, for the sum of *one thousand* dollars, which amount was bid by the said *James Howie*, and was the highest bid made therefor at said auction. Now, therefore, in consideration of the said sum of *one thousand* dollars to me paid by the said *James Howie*, the receipt whereof is hereby acknowledged, I do, as Administrator as aforesaid, and by virtue of the aforesaid license, hereby grant,

<sup>1</sup> P. S., c. 134, § 14.

<sup>2</sup> P. S., c. 134, § 15.

bargain, sell, and convey unto the said *James Howie and his heirs and assigns, a certain lot of land, with the buildings thereon, situate in said Salem, and bounded on the east by Jarow street, on the south by land of Abel Grant, on the west by land of Jowder Lonfrey, and on the north by Yellow lane, so called.* To have and to hold the granted premises, with all the privileges and appurtenances thereto belonging, to the said *James Howie and his heirs and assigns, to their own use and behoof forever.* And I do hereby covenant with the grantee and *his heirs and assigns* that the notice of the time and place of said sale was given according to the order of the Probate Court, and that the said premises were sold accordingly at public auction as above set forth. In witness whereof I hereto set my hand and seal this *twelfth day of May, in the year one thousand eight hundred and ninety-six.*

Signed and sealed in presence of  
*Daniel Towne.*

*John Smith [SEAL],*  
*Administrator.*

#### COMMONWEALTH OF MASSACHUSETTS.

*Essex, ss. May 12, 1896.* Then personally appeared the above-named *John Smith, administrator,* and acknowledged the foregoing instrument to be *his* free act and deed.

Before me, *Walter J. Cross,* Justice of the Peace.

#### *At Private Sale.*

The court may authorize the administrator to make a private sale of the real estate of the deceased for the payment of debts, where an offer has been made for its purchase.<sup>1</sup> The petition is the same as that for license to sell at public auction down to the asterisk (\*), the remainder being as follows :—

That an advantageous offer for the purchase of the parcel hereinafter described has been made to your petitioner, to wit, the sum of *one thousand* dollars;

<sup>1</sup> St. 1886, c. 137, § 1.

That the real estate which the petitioner proposes to sell consists of the following parcel, to wit:

[Describe the real estate, as in the petition for license to sell at public auction.]

And that by a partial sale thereof the residue would be greatly injured, and that the interests of all parties concerned will be best promoted by an acceptance of said offer. Wherefore your petitioner prays that he may be licensed to sell at private sale, in accordance with said offer, or upon such terms as may be adjudged best, the whole of said parcel, for the payment of said debts and charges of administration.

Dated the *first* day of *March*, A. D. 1896.

*John Smith.*

Parties interested must either assent in writing, or be given notice of the petition and of the time and place appointed for hearing the same, by service of such notice personally on them at least fourteen days before the time appointed for the hearing, or by publication three weeks successively in such newspaper as the court orders.<sup>1</sup>

The decree declares that it is necessary to sell some part of the real estate of said deceased, for the payment of his debts and charges of administration, the personal estate being insufficient therefor, and that by a partial sale the residue of the said parcel would be greatly injured; that an advantageous offer for the purchase thereof has been made to said petitioner, and that the interest of all parties concerned will be best promoted by an acceptance of said offer; and the decree will be that the petitioner be licensed to sell and convey, in accordance with said offer, or for a larger sum, the whole of the said parcel of real estate.

<sup>1</sup> St. 1886, c. 137, § 2.

The license issued upon the decree gives authority to sell for the sum offered, or for a larger sum, at private sale, or to the highest bidder at public auction. If sold at public auction, the administrator must proceed as in the ordinary case of license to sell at public auction.<sup>1</sup> In either case the sale must be made within one year from and after the date of the license.

The deed in the case of a private sale is in the following form :—

Know all men by these presents, that whereas *I, John Smith*, of *Salem*, in the Commonwealth of Massachusetts, as administrator of the estate of *Thomas Smith*, late of said *Salem*, deceased, by virtue of a license granted to me on the *third* day of *April*, 1896, by the Probate Court for the County of *Essex*, in said Commonwealth, have sold the real estate of said deceased hereinafter described, at private sale, to *Colin James* of *Danvers*, in said county of *Essex*, for the sum of *one thousand* dollars. Now, therefore, in consideration of the said sum of *one thousand* dollars to me paid by the said *Colin James*, the receipt whereof is hereby acknowledged, I do, as administrator as aforesaid, and by virtue of the aforesaid license, hereby grant, bargain, sell and convey unto the said *Colin James and his heirs and assigns* [Describe the real estate conveyed]. To have and to hold the granted premises, with all the privileges and appurtenances thereto belonging, to the said *Colin James and his heirs and assigns*, to their own use and behoof forever. In witness whereof I hereto set my hand and seal this *tenth* day of *April*, in the year one thousand eight hundred and ninety-six. Signed and sealed in presence of

*Daniel Towne.*

*John Smith* [SEAL],  
Administrator.

[Acknowledgement.]

<sup>1</sup> St. 1886, c. 137, § 1.



Administrators may, after the same notice to persons interested that is required upon a petition by such parties for a license to sell real estate, be authorized by the probate court to release and discharge, upon such terms and conditions as may appear to be proper, a vested, contingent, or possible right or interest belonging to the persons or estates by them represented in, or to real or personal estate, when such release or discharge appears to be for the benefit of such persons or estates.<sup>1</sup>

Administrators may be authorized by the probate court, after notice to all persons interested, or upon their assent thereto, to sell and convey or release, upon such terms and in such manner as the court may order, lots in cemeteries belonging to the persons or estates by them represented.<sup>2</sup>

*Sales may be Examined into.*—Every person authorized to make sale of land by license of court is required, upon application to the probate court by an heir, creditor, ward, or other person interested in the estate, to make answer upon oath as to all matters touching his exercise and fulfilment of said license, as fully as he is liable to account and be examined in reference to personal estate. If, in relation to the exercise of such license or to a sale under it, there is any neglect or misconduct in the proceedings of such person, by which a person interested in the estate suffers damage, such interested person may recover compensation therefor on the probate bond or otherwise, as the case may require.<sup>3</sup>

<sup>1</sup> P. S., c. 142, § 4.

<sup>3</sup> P. S., c. 142, § 11.

<sup>2</sup> P. S., c. 142, § 5.

## SALE OF PROPERTY, ETC., BY FOREIGN ADMINISTRATORS.

An administrator appointed in another state or in a foreign country on the estate of a person dying out of the commonwealth, upon whose estate there is no administrator appointed here, may file an authenticated copy of his appointment in the probate court for any county in which there is real estate of the deceased, after which he may be licensed by such probate court to sell real estate for the payment of debts and charges of administration in the same manner and upon the same terms and conditions as an administrator appointed within the commonwealth.<sup>1</sup>

Such administrator, before making such sale, must file a bond payable to the judge of such probate court with sufficient surety or sureties, and with condition to account for and dispose of said proceeds according to law ; unless it appears to the court that such administrator has given a sufficient bond, in the state or country where he was appointed, to account for the proceeds of such sale, and an authenticated copy of such bond is filed in the probate court where the copy of his appointment is filed. Then, no bond will be required.<sup>2</sup>

Notice of such sale must be given, and other proceedings had, and the evidence of the sale perpetuated by affidavit, as in a sale made by an administrator appointed within the commonwealth.<sup>3</sup>

An administrator duly appointed in another state or foreign country, and duly qualified and acting, who

<sup>1</sup> P. S., c. 134, § 16.

<sup>3</sup> P. S., c. 134, § 18.

<sup>2</sup> P. S., c. 134, § 17.

may be entitled to any personal property in this commonwealth, may, upon petition to the probate court, and after such notice to all persons interested as the court may order, be licensed to receive or to sell by public or private sale on such terms and to such person or persons as he shall think fit, or otherwise to dispose of, and to transfer and convey, any personal estate in the county in which he applies or any shares in a corporation which has an established or usual place of business in such county ; provided, it appears to the court that there is no administrator appointed in this commonwealth who is authorized so to receive and dispose of such shares or estate, and that such foreign administrator will be liable, upon and after such receipt or sale, to account for such shares or estate, or for the proceeds thereof, in the state or country in which he was appointed ; and, provided that no person resident in this commonwealth and interested as a creditor or otherwise objects to the granting of such license, or appears to be prejudiced thereby ; but no such license shall be granted to a foreign administrator until the expiration of six months from the death of his intestate.<sup>1</sup>

All proceedings in the probate court respecting sales by a foreign administrator must be had in the county in which an authenticated copy of his original appointment is filed.<sup>2</sup>

#### PERPETUAL CARE OF BURIAL LOTS.

Administrators may pay to cemetery corporations or to cities or towns having burial places therein a rea-

<sup>1</sup> P. S., c. 142, § 3.

<sup>2</sup> P. S., c. 142, § 7.

sonable sum of money for the perpetual care of the lot in which the body of their intestate is buried. The probate court may determine, after notice to all parties in interest, to whom the same is to be paid and the amount thereof, and such sum will be allowed in final accounts of such administrators.<sup>1</sup>

For this purpose the general blank petition issued by the probate court should be used. All the facts necessary on which to found a decree should be plainly stated, and the prayer should follow the statute.

#### SUCCESSION OR COLLATERAL TAX.

The Succession or Collateral Tax, payable to the state treasurer, under St. 1891, c. 425, and acts in amendment thereof, is due at the end of two years from the date of the approval of the administrator's bond, except when distributive shares are paid within the two years, the tax thereon is due at the time the same are paid. In cases, however, where the probate court has ordered the administrator to retain funds to satisfy a claim of a creditor, whose right of action for which does not accrue within the two years, the payment of the tax may be suspended by an order of the court to await the disposition of such claim. If the tax is not paid when due, interest at the rate of six per cent. per annum is collected from the time the same became due ; and the tax and interest that may accrue on the same is a lien on the property subject to the tax till the same is paid to the commonwealth.<sup>2</sup>

An administrator having in charge or trust any

<sup>1</sup> St. 1897, c. 321.

<sup>2</sup> St. 1895, c. 430, § 1.

property subject to this tax, must deduct the tax therefrom, or collect it thereon from the legatee or person entitled to said property, and he must not deliver any specific legacy or property subject to said tax to any person until he has collected the tax thereon.<sup>1</sup>

Whenever any of the real estate of a decedent passes to another person, subject to said tax, the administrator of the decedent must inform the state treasurer thereof within six months after he has assumed the duties of his trust, or if the fact is not known to him within that time, then within one month from the time when the fact becomes known to him.<sup>2</sup>

Whenever, for any reason, the heir, who has paid any such tax, afterwards refunds any portion of the property on which it was paid, or it is judicially determined that the whole or any part of such tax ought not to have been paid, said tax, or the due proportional part thereof must be paid back to him by the administrator.<sup>3</sup>

The value of the property subject to the tax is its actual value as found by the probate court, but the state treasurer, or any person interested in the succession to said property, may apply to the probate court having jurisdiction of the estate, and on such application the court must appoint three disinterested persons who, being first sworn, must appraise such property at its actual market value, for the purposes of the tax, and must make return thereof to the court, which return may be accepted by the court; and if so accepted it is binding upon the person by whom the

<sup>1</sup> St. 1891, c. 425, § 5.

<sup>2</sup> St. 1891, c. 425, § 11.

<sup>3</sup> St. 1891, c. 425, § 12, amended by

St. 1892, c. 379.

tax is to be paid, and upon the commonwealth. The fees of the appraisers are fixed by the judge of probate, and paid by the state treasurer. In case of an annuity or life estate the value thereof is determined by the so called actuaries' combined experience tables and four per cent. compound interest.<sup>1</sup>

No final settlement of the account of an administrator can be accepted or allowed by the probate court unless such account shows, and the judge of the court finds, that all this tax upon the estate to be settled by the account, has been paid; and the receipt of the state treasurer is the proper voucher for such payment.<sup>2</sup>

It is advisable for the administrator to consult the judge of the probate court in which the estate is being settled in relation to the tax before rendering any account of the property subject to the tax to the state treasurer, as the judge has the final adjudication of the matter, and upon the correctness of the tax and the payment thereof depends the allowance of the entire account. Upon application, the state treasurer will forward a blank statement, prepared for the purpose, upon which the administrator can make his report of the estate that is subject to this tax. If the return is apparently correct, upon receipt of the amount of the tax due as therein represented the state treasurer will give a receipt in proper form, which will be a voucher for the payment thereof in the settlement of the account of the administrator in the probate court. It is well to have this receipt recorded in the probate court records.

<sup>1</sup>St. 1891, c. 425, § 13. See table on pages 69 and 70.

<sup>2</sup>St. 1891, c. 425, § 16.



## ACCOUNT.

An administrator is not bound to render an account of his administration until he has received some property of the estate.<sup>1</sup>

At the end of two years from the date of the administrator's appointment, if he has paid all bills against the estate that are known to him, and has collected all the claims due to the estate that are collectible, and no suit has been brought against the estate which remains unsettled, the administrator must render an account of his settlement of the estate to the court which appointed him. It is the law, and the bond is conditioned to return an account once a year and at such other times as the court may order, but this is rarely complied with, though it can be requested by any person in interest at least once a year. Upon the application of an administrator, the court may excuse him from rendering an account in any year, if satisfied that it is not necessary or expedient that such account should be rendered.<sup>2</sup>

Under probate rule XI, "Notice upon an account not intended as final will be issued only by direction of the court. Every such account, when no notice has been ordered, unless accompanied by the assent in writing of all persons interested, will be filed, the footings of its schedules entered upon the docket, and the consideration of its allowance will be postponed till the hearing upon the final account."

The account should be rendered in the following form :—<sup>3</sup>

<sup>1</sup> *Walker v. Hall et al.*, 1 Pick. 20 (1822).

<sup>2</sup> P. S., c. 144, § 1.

<sup>3</sup> St. 1895, c. 210.

## ADMINISTRATION ON INTESTATE ESTATES. 191

The *first*; [or, *second*; or, *first and final*, etc.] account of *John Smith*, administrator of the estate of *Thomas Smith*, late of *Salem*, in the county of *Essex*, merchant, deceased.

This account is for the period beginning with the *first* day of *March*, A. D. 1895, and ending with the *tenth* day of *March*, A. D. 1897.

Said accountant charges himself with the several amounts received, as stated in Schedule A, herewith exhibited.....	\$2,500.00
And asks to be allowed for sundry payments and charges, as stated in Schedule B, herewith exhibited.....	1,500.00
	\$1,000.00
Balance as stated in Schedule C, herewith exhibited..	\$1,000.00

John Smith, Administrator.

### SCHEDULE A.

Amount of personal property, according to inventory <sup>1</sup> ....	\$1,750.00
Balance of next prior account <sup>2</sup> .....	
Amounts received from income, gain on sale of personal property over appraised value, and from other property, as follows:	

1895.

1	Apr. 2	By interest on deposit in Salem Savings Bank, Book No. 101.....	11.00
2	“ 3	By sale of personal property over appraised value <sup>3</sup> .....	468.00

1896.

3	Jan. 4	By claims collected from the following persons, not inventoried:— <sup>3</sup>	
		Thomas Andover, jr.....	16.00
		Nellie Coupe.....	3.35

<sup>1</sup> If it is a second account cross out this line. ing for increase in value of the personal assets of the deceased, and for personal property not inventoried.

<sup>2</sup> If it is an original account cross out this line. P. S., c. 141, §§ 3, 4, 5.

<sup>3</sup> This is the method of account-

4	July 21	By sale of real estate (house lot on Winter street), sold to James Smith, for the payment of debts, etc.....	300.00
			<hr/>
			\$2,548.35

## SCHEDULE B.

Showing payments, charges, losses and distributions.  
1895.

1	Apr. 12	To Mary Smith, widow of deceased, allowance.....	\$150.00
2	" 13	To John Jones, Richard Long and George Mason, appraisers, services.....	18.00
3	" 14	To George Lamson, auctioneer, bill for services, advertising auction, etc.....	37.50
4	" 17	To Geo. M. Stone, M. D., medical services .....	79.00
5	" "	To T. O. Full, undertaker, bill:.....	101.00
6	" 18	To Zeno Renon, nursing.....	30.50
7	May 2	To Miller, Ames & Co., gravestone.....	95.00
8	" 19	To City of Salem, taxes for 1894.....	171.75
9	" 27	To " " " water bill.....	16.80
10	" 28	To Salem Gazette, advertising citation..	3.00
11	June 1	To costs of suit against James Lang <sup>1</sup> ....	19.00
12	July 15	To John Bill, labor.....	14.25

1896.

13	June 1	To sale of personal property, less appraised value, <sup>2</sup> .....	130.00
		To demand against John Adams, uncollectable <sup>2</sup> .....	21.00
14	Sept. 2	To error in inventory, by insertion therein one ox which did not belong to the estate <sup>2</sup> .....	40.00

<sup>1</sup> The allowance of costs in suits of an administrator is in the discretion of the court. P. S., c. 144, § 10.      <sup>2</sup> This is the method of accounting for loss on sale of personal property of an estate, etc. P. S., c. 144, § 3.

# ADMINISTRATION ON INTESTATE ESTATES. 193

1897.

15	Mch. 5	To State Treasurer, collateral or succession tax.....	70.00
16	" 5	To services as administrator <sup>1</sup> .....	300.00
17	" 5	To James Smith, son of deceased, distributive share.....	310.00
		To John Smith, son of deceased, distributive share.....	310.00
		To Samuel Jones, grandson of deceased, distributive share.....	155.00
		To Solomon Jones, grandson of deceased, distributive share.....	155.00
		To Mary Wales, daughter of deceased, distributive share.....	310.00
			<hr/>
			\$2,576.80

## SCHEDULE C.<sup>2</sup>

[This schedule contains all items of personal property now in possession of the accountant, including cash. And if the administrator has changed any investment he should state it in this schedule.]

To deposit in Salem Savings Bank, deposit book No. 101,	\$470.00
To 40 shares of stock, Boston & Maine Railroad Com- pany, certificate No. 1011.....	8,000.00
To cash.....	117.50
To real estate mortgage of Jonas Warren.....	1,250.25
	<hr/>
	\$9,837.75

<sup>1</sup> Probate rule IX provides that "No administrator shall receive any compensation by way of a commission upon the estate by him administered, but shall be allowed his reasonable expenses incurred in the execution of his trust, and such compensation for his services as the court in each case may deem just and reasonable. The account shall contain an itemized statement of

the expenses incurred, and shall be accompanied by a statement of the nature of the services rendered, and of such other matters as may be necessary to enable the court to determine what compensation is reasonable." See P. S., c. 144, § 7.

<sup>2</sup> If the account is a final one and contains the payment of the distributive shares to the heirs, there will be no need of schedule C.

The account must be sworn to be "just and true," and a certificate of the oath attached. The oath of one of two or more joint administrators is sufficient in the discretion of the court.<sup>1</sup>

The parties in interest may assent to the account by signing their names to the following:—

The undersigned, being all persons interested, having examined the foregoing account, request that the same may be allowed without further notice.

If they do not assent in writing they must be cited before the account will be allowed. The citation is served by delivering a copy of it to all persons interested in the estate fourteen days at least before the return day named therein, or by publishing the same once in each week, for three successive weeks in a newspaper named therein, the last publication to be one day at least before the return day, and by mailing, post-paid, a copy of the citation to all such persons seven days at least before said day. The copy is best obtained by cutting the printed citation from the newspaper when the latter mode of notice is adopted. The return on the citation, which must be made under oath as in other cases, must show which method of notice was used.

The accountant may be examined on oath before the court upon any matter relating to his accounts.<sup>2</sup>

The decree of the court will be that the account "be allowed," having stated that the same has "been examined and considered by the court."

When an account is settled in the absence of a per-

<sup>1</sup> P. S., c. 144, § 11.

<sup>2</sup> P. S., c. 144, § 2.

son adversely interested and without notice to him, it may be opened upon his application at any time within six months after the settlement; and upon the settlement of an account all former accounts of the same accountant may be so far opened as to correct a mistake or error therein.<sup>1</sup> This right to open former accounts is limited to accounts in the course of settlement of the same estate.<sup>2</sup>

When upon the filing of an account in a probate court it appears to the court for cause shown that the items thereof should be finally determined and adjudicated, or at the option of the accountant after two years since any such adjudication, or his appointment, notice of such proposed action on such account must be given to all parties as the court orders; if the interest of a person unborn, unascertained or legally incompetent to act in his own behalf is not represented otherwise than by the accountant, the court must appoint some competent and disinterested person to act as guardian *ad litem* or next friend for such person, and to represent his interest in the case.<sup>3</sup> This appointment is in the following form:—

## COMMONWEALTH OF MASSACHUSETTS.

*Essex*, ss.

PROBATE COURT.

At a Probate Court holden at *Hamilton*, in said county, on the *twenty-first* day of *June*, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas, in the matter of the *first* [or, *second*; etc.] account of *John Smith*, administrator of the estate of *Thomas Smith*, late of *Salem*, in said county of *Essex*, it appears that *Joanna*

<sup>1</sup> P. S., c. 144, § 9.

98 Mass. 462 (1868).

<sup>2</sup> *Granger et al.*, ex'rs, v. *Bassett*,<sup>3</sup> St. 1895, c. 288, § 1.



*Perkins* is a minor [or, an insane person], and interested in said account, and has no legal guardian, except the accountant, therefore *Joseph Lucy* of *Beverly*, in the county of *Essex*, is hereby appointed to act as guardian *ad litem* or next friend for such person, to represent her interest in said case.

*Josiah Randall*, Judge of Probate Court.

This appointment is accepted as follows :—

I hereby accept the above appointment.

*Joseph Lucy*.

Before examining the account the guardian *ad litem* must be sworn,<sup>1</sup> and a certificate of oath attached to the letter of appointment in the following form :—

*Essex*, ss. *July 2*, A. D. 1891. Personally appeared *Joseph Lucy*, and made oath that he would faithfully and impartially perform the duty reposed in him by the foregoing appointment.

*Thomas Mingo*, Justice of the Peace.

The report of the guardian *ad litem* is ordinarily in the following form :—

Having fully examined and considered the matter of the above-named account, I hereby [or, *do not*] assent to the allowance of the same.

*Joseph Lucy*.

When an administrator has paid or delivered over to a widow, husband or heir-at-law, any money or other property in his hands, without a previous order of court, and thereafter renders an account with a full and detailed statement thereof, verified by his oath, if, after such notice to all persons interested as the court may order, it appears that the persons to whom such payment of money or delivery of prop-

<sup>1</sup> St. 1895, c. 288, § 1.

erty was made would have been entitled to an order of court for such payment and delivery, and that such account ought to be allowed, a decree made accordingly has the same effect to discharge and exonerate the accountant and his sureties from further liability as if such payment and delivery had been made under a previous order of the probate court.<sup>1</sup>

#### AUDITOR.

After an account of an administrator has been filed, the judge may, before approving the same, appoint one or more auditors to hear the parties interested, examine vouchers and evidence, and report upon the same to the court, which report is *prima facie* evidence upon such matters as are expressly referred to them. The court must award reasonable compensation to such auditors, to be paid by the county.<sup>2</sup>

The appointment is in the following form :—

#### COMMONWEALTH OF MASSACHUSETTS.

*Essex*, ss.

PROBATE COURT.

*March 17, A. D. 1897.*

In the matter of the *first* [or, *second* ; or, *first and final* ; etc.] account of *John Smith*, administrator of the estate of *Thomas Smith*, late of *Salem*, in said county of *Essex*, merchant, deceased.

It is ordered that *James Barlow* of *Danvers*, in said county, be, and he hereby is, appointed auditor in the above-mentioned matter, to hear the parties interested, examine vouchers and evidence and report upon the same to this Court.

*Charles Long*, Judge of Probate Court.

<sup>1</sup> St. 1894, c. 303.

<sup>2</sup> St. 1889, c. 311.

The auditor may simply examine accounts and vouchers, or conduct hearings as auditors appointed by the common-law courts, as the circumstances of the case may demand. They must report to the court which appointed them. Their report should be substantially in the following form :—

Having examined the vouchers of the administrator and heard all evidence pro and con which any party interested desired to be heard relative to the matter herein referred to me, I do hereby report as follows:—

*Schedule A.* I approve of and allow all items in Schedule A in full.

*Schedule B.* I approve of and allow in full items numbered one (1), four (4), five (5), six (6), and eight (8). Of the other items of schedule B I find as follows:—

*Item 2.* The estate was nowise responsible for this claim, and should not be held for its payment, in neither whole nor part.

*Item 3.* The amount claimed in item three is too large, and only ten dollars of the same should be allowed against the estate.

*Item 7.* The administrator has no voucher for the amount claimed in this item to have been paid, and the evidence regarding the same is so conflicting and doubtful that I cannot allow either the whole or any part of the amount claimed in this item.

*Schedule C.* I find that schedule C is correct.

James Barlow,  
Auditor.

#### DISTRIBUTION.

##### *Of Personal Estate.*

Administrators may pay to the heirs their shares of the balance of the estate after the debts, charges of

administration, etc., have been paid, and ask the court in his account to allow him for the same. This the court may do. But it is not safe to do this, as his determination as to whom the heirs are and the amounts of their respective legal shares is not binding. A decree of the court is the only way by which he is protected.<sup>1</sup> In the final settlement of an estate of considerable size, and of one where the family is not well known to him, the administrator should apply to the probate court for such a decree and an order of distribution.

An heir may require an administrator to pay over his distributive share in an estate within two years after the date of the approval of his bond, but in such case the probate court may require that such heir first give bond to the administrator, with surety or sureties to be approved by such court, and conditioned to refund the amount so to be paid, or so much thereof as may be necessary to satisfy any demands that may be afterwards recovered against the estate, and to indemnify the administrator against all loss on account of such payment.<sup>2</sup>

The court may at any time order a partial distribution of the personal property of an estate to all the heirs, if it will not be detrimental to the estate.<sup>3</sup>

The petition therefor is in the following form :—

To the Honorable the Judge of the Probate Court in and for the County of *Essex* :

Respectfully represents *John Smith, administrator hereinafter mentioned* [or any other person in interest], that there is a bal-

<sup>1</sup> *Palmer, ex'x, v. Whitney, adm'r*, 166 Mass. 306 (1896).

<sup>2</sup> P. S., c. 136, § 20.

<sup>3</sup> P. S., c. 136, § 21.

ance of the estate of *Thomas Smith*, late of *Salem*, in said county of *Essex*, merchant, deceased, intestate, in the hands of his administrator, which remains to be distributed among his widow and next of kin, whose names, places of residence and relationship to the deceased are supposed, or claimed to be as follows:

NAME.	RESIDENCE.	RELATIONSHIP.	SHARE.
<i>Ann Smith</i> ,	<i>Salem, Mass.</i> ,	widow,	one-third,
<i>James Smith</i> ,	" "	son,	one-sixth.
<i>John Smith</i> ,	" "	"	" "
<i>Mary Brown</i> ,	<i>Danvers, Mass.</i> ,	daughter,	" "
<i>Sally Jones</i> ,	<i>Essex, Mass.</i> ,	granddaughter,	one-twelfth.
<i>George Jones</i> ,	<i>Manchester, Mass.</i> ,	grandson,	" "

Wherefore your petitioner prays that distribution of such balance may be decreed by the court among such persons as may be proved to be entitled thereto, according to law.

Dated this *first* day of *January*, A. D. 1897.

*John Smith.*

This must be sworn to, and a certificate of the oath in the following form attached:—

*Essex*, ss. *January 1*, A. D. 1897. Then personally appeared *John Smith*, and made oath to the truth of the above representation, according to the best of his knowledge and belief.

Before me, *Anson N. Owen*, Justice of the Peace.

Whether assented to by the parties named as interested in the distribution or not, public notice of the petition must be given that any other parties may appear and claim their interest. The citation issued is to be served by publishing in a newspaper named therein, once a week for three successive weeks, the last publication to be one day at least before the re-

turn day named therein. The return on such a citation is as follows :—

I have served the foregoing citation as therein ordered.

*John Smith.*

The person making the return must swear to its truth, and a certificate of the oath must be annexed thereto.

The decree must show that it appears “by the account of *John Smith*, administrator of said estate, allowed by said court on the *first* day of *January*, A. D. 1897, that there is in his hands a balance of *one thousand and forty-four* dollars, and that the following persons<sup>1</sup> are entitled thereto in the proportions specified as follows :

*Ann Smith, Salem, Mass., one-third.*

*James Smith, “ “ one-sixth.*

*John Smith, “ “ “ “*

*Mary Brown, Danvers, Mass., one-sixth.*

*Sally Jones, Essex, Mass., one-twelfth.*

*George Jones, Manchester, Mass., one-twelfth.*

And that it is decreed that said balance be distributed among them, and that an order for such distribution be issued accordingly, with the direction to deposit in the *Salem Five Cents Savings Bank*, in the name of the Judge of Probate, any sums remaining unpaid after six months.”

The order of distribution issued on the decree is in the following form :—

<sup>1</sup> A decree of distribution is not to be made in general terms, but must state the names of the persons entitled to distribution, and the amount or proportion due to each. *Loring v. Steineman*, 1 Met. 204 (1840).



## COMMONWEALTH OF MASSACHUSETTS.

*Essex*, ss.

PROBATE COURT.

To *John Smith*, administrator of the estate of *Thomas Smith*, late of *Salem*, in the county of *Essex*, deceased.

You are ordered to distribute the balance of *one thousand and forty-four* dollars, in your hands, according to your account allowed by said court on the *first* day of *January*, A. D. 1897, by paying forthwith to the persons and in the amounts hereinafter specified, who, it appears to the court, are the widow [or, *husband*] and next of kin of said deceased, and entitled thereto in such proportions [add, if deemed necessary, *retaining in your hands fifteen dollars thereof for future charges*<sup>1</sup>].

You are ordered to give written notice, by mail or otherwise, to each of said persons of the amount due him or her, and if any of said sums remain for six months unclaimed, you are directed to deposit the same in the *Salem Five Cents Savings Bank*, in *Salem*, in the name of the Judge of said Court, for the time being, to accumulate for the persons entitled thereto.

Within one year after the date hereof you are required to present to this court, under oath, a true account of the payments made by you, and of the amounts deposited as aforesaid, together with the original certificates or other evidence of such deposits, and also to return this order and the receipts of the persons whom you have paid.

Witness, *James Jameson*, Esquire, Judge of said Court, at *Salem*, this *twenty-seventh* day of *January*, in the year of our Lord one thousand eight hundred and ninety-seven.

*Andrew Juder*, Register.

<sup>1</sup> A small sum is often thus left in pay him for his service and expense the hands of the administrator to in executing this order.

The names and amounts to be distributed are as follows:		We severally acknowledge the receipt of the sums set against our respective names. <sup>1</sup>
NAMES OF PERSONS TO BE PAID.	AMOUNTS.	
<i>Ann Smith,</i>	<i>\$348.00</i>	<i>Ann Smith.</i>
<i>James Smith,</i>	<i>174.00</i>	<i>James Smith.</i>
<i>John Smith,</i>	<i>174.00</i>	<i>John Smith.</i>
<i>Mary Brown,</i>	<i>174.00</i>	<i>Mary Brown.</i>
<i>Sally Jones,</i>	<i>87.00</i>	<i>Sally Jones.</i>
<i>George Jones,</i>	<i>87.00</i>	<i>George Jones.</i>

The return on the order by the administrator is in the following form :—

I hereby certify that I have paid, according to the foregoing order, all the before-named persons the sums to which they are entitled, as appears by their respective receipts, except<sup>2</sup> the sum due to *Mary Brown*, amounting to *one hundred and seventy-four* dollars, which I have deposited in the *Salem Five Cents Savings Bank in Salem*, according to the order of court, and return the evidence thereof herewith.

*John Smith, Adm.*

This return must be sworn to before the court, and the decree will be that the same be allowed and recorded, and that the original evidences of deposit be filed.

*Ancillary Administrators.*—Upon the settlement of the trust of an ancillary administrator, and after the payment of all debts for which the same is liable in

<sup>1</sup> When the parties are paid they must receipt for their shares by signing their names in this space opposite their names. They must sign in person and not by attorney. If they sign by mark, their signature should be witnessed by some one who can write.

<sup>2</sup> When one or more is not paid add this clause; if all have been paid cross this out. The bank book or deposit receipt must be filed in court.

this commonwealth, the residue of the personal estate may be distributed and disposed of in accordance with the laws of the state or country of which the deceased was an inhabitant; or, in the discretion of the court, it may be transmitted to the executor or administrator, if any, in the state or country where the deceased had his domicil, to be there disposed of according to the laws thereof.<sup>1</sup>

*Deposit of Distributive Shares, etc., in Savings Banks.*—If any sum of money, which the probate court has ordered to be paid over, has remained unclaimed for six months, the administrator may deposit the same in a savings bank or other like institution, or invest it in bank stock or other stocks, as the probate court may direct, to accumulate for the benefit of the person entitled thereto. Such deposit is to be made in the name of the judge of the probate court for the time being, and is subject to the order of the judge and of his successors in office. The person making such deposit or investment must file in the probate court a memorandum thereof, with the original certificates or other evidences of title thereto, which must be allowed as a sufficient voucher for such payment. When the person entitled to the money deposited satisfies the judge of his right to receive the same, the judge must cause it to be paid over and transferred to him.<sup>2</sup>

The probate court must, upon the application of any person interested, or of the attorney-general, and

<sup>1</sup> P. S., c. 138, §§ 1, 2.

The rate of interest is the same as

<sup>2</sup> P. S., c. 144, § 16. The amount that can be thus deposited and draw interest is unlimited. St. 1889, c. 86.

that of other depositors. St. 1889, c. 449, § 1.

after such public notice as the court or any judge or justice thereof may deem proper to be given, order and decree that all sums of money heretofore or hereafter deposited in a savings bank, institution for savings or trust company, by authority of said court or any judge thereof, and which shall have remained unclaimed for a period of more than five years from the date of such deposit, with the increase and proceeds thereof, be paid to the state treasurer, to be held and used by him according to law, subject for fifteen years only to be paid with interest at the rate of three per cent. per annum from the time it is so paid to said treasurer to the time it is paid by him to the person or persons having, and established, a lawful right thereto.<sup>1</sup>

The judge of any probate court may, upon the application of any person interested, and after such public notice as said court may deem proper, order all sums of money or the proceeds thereof deposited or invested by authority of said court, and which shall have remained unclaimed for a period of twenty years from the date of such deposit or investment, to be paid to the residuary legatee of the person to whose estate the money belonged, if there is such a residuary legatee, or if no such residuary legatee be then living, then to the heirs of such residuary legatee living at the time of such distribution; and if no such residuary legatee or any of his heirs be then living, or if such deceased person died intestate, said money and the proceeds thereof must be disposed of and distributed among the persons entitled thereto,

<sup>1</sup> St. 1889, c. 449, § 2.

and in the manner provided for by the law for the distribution of personal estate of a deceased person not lawfully disposed of by will; provided, however, that the judge of probate shall first require from the person or persons to whom such sums are ordered to be paid a sufficient bond of indemnity, with two sufficient sureties to be approved by him, with condition to repay to the person or persons for whose benefit such deposit or investment was originally made, or to the personal representatives of such person or persons, all sums thus paid over.<sup>1</sup>

The judge of probate ordering such distribution may appoint an administrator *de bonis non* to make it.<sup>2</sup>

*Final Discharge of Administrator.*—When an administrator has distributed all the property of the estate in his hands, as ordered by a decree of the court, he may perpetuate the evidence thereof by presenting to said court, within one year after the decree is made, an account, under oath, of such payments or delivery over of the property; and the account, being proved to the satisfaction of the court, must be allowed as his final discharge, and ordered to be recorded. Such discharge forever exonerates the party and his sureties from all liabilities under such decree, unless the account is impeached for fraud or manifest error.<sup>3</sup>

### *Of Real Estate.*

Upon the petition of an administrator of an intestate estate, with the consent of all parties interested, or after such notice as may be ordered, the probate

<sup>1</sup> St. 1890, c. 408, § 1.

<sup>3</sup> P. S., c. 144, § 12.

<sup>2</sup> St. 1890, c. 408, § 2.

court may license such administrator to sell the whole or any undivided interest in real estate belonging to the estate, when the appraisal shows that it does not exceed in value the sum of fifteen hundred dollars, in such manner and upon such notice as the court may direct, for the purpose of distribution; and the net proceeds of such sale, after deducting the expenses thereof, must, after two years from the time the administrator's bond is filed, be distributed to the same persons who would have been entitled to the real estate, and in the proportions to which they would have been entitled had it not been sold.<sup>1</sup>

The petition is in the following form:—

To the Honorable the Judge of the Probate Court in and for the County of *Essex* :

Respectfully represents *John Smith*, administrator of the estate of *Thomas Smith*, late of *Salem*, in said county of *Essex*, deceased, intestate, that said *Thomas Smith*, at the time of his decease, was the owner of certain real estate situate in *Salem*, in the county of *Essex*, bounded and described as follows, viz: *A certain lot of land, bounded on the north by Ambrose street, on the east by land of Thomas Allen, on the south by the harbor, and on the west by land of Walter Cross; also, an undivided half part of a certain lot of land, bounded on the northeast by land of Julia Hathorne, on the southeast by Anderson street, on the southwest by land of Moses Allen, and on the northwest by land of Samuel Winter, the same being all the real estate of said deceased.*

That the value of the said estate, according to the appraisal now on file in said court, does not exceed the sum of fifteen hundred dollars; that it is for the advantage of all parties interested that the same be sold for the purpose of distribution;

<sup>1</sup> St. 1890, c. 266.



that an advantageous offer for the purchase thereof, to wit, the sum of *eight hundred* dollars, has been made to your petitioner by *Robert Stone*, and that the interest of all parties concerned will be best promoted by an acceptance of such offer.

Therefore your petitioner prays that he may be licensed to sell the said real estate of said deceased at private sale, in accordance with such offer, or in such manner as the court may direct, for the purpose of distribution.

Dated this *second* day of *December*, A. D. 1896.

*John Smith.*

The persons interested may assent to the petition, but those that do not must be cited into court to object thereto. The citation is served by delivering a copy thereof to all persons interested, who can be found within the commonwealth (who have not assented to the petition in writing) fourteen days at least before the return day named therein, and if any one cannot be so found, by publishing the same once in each week, for three successive weeks, in a newspaper named in the citation, the last publication to be one day at least before the return day.

The return on the citation must state the manner of service, either of delivery or publication or both, in the ordinary form. The return must be sworn to, and a certificate of the oath attached and filed in court.

The decree will be in the following form:—

On the petition of *John Smith*, administrator of the estate of *Thomas Smith*, late of *Salem*, in said county of *Essex*, deceased, intestate, praying for license to sell the real estate of said deceased, described in said petition, in accordance with the offer named in said petition, at private sale or upon such terms as may be adjudged best, for the purpose of distribution; all per-

sons interested having been duly notified, and having assented thereto, and no person objecting, and it appearing that said real estate, by the appraisal thereof, does not exceed in value the sum of fifteen hundred dollars; that an advantageous offer for the purchase thereof has been previously made to the administrator; that the interest of all parties concerned will be best promoted by an acceptance of said offer; and that it is expedient to sell said real estate of said deceased for the purpose of distribution.

It is decreed that said administrator be licensed to sell and convey at private sale, in accordance with said offer or for a larger sum, or to sell at public auction, if he shall think best so to do, the real estate of said deceased described in said petition.

The license issued on this decree is in the following form:—

## COMMONWEALTH OF MASSACHUSETTS.

Essex, ss.

PROBATE COURT.

[SEAL] To *John Smith*, administrator of the estate of *Thomas Smith*, late of *Salem*, in said county, *merchant*, deceased, intestate:

You are licensed to sell and convey, at private sale, for the sum of *eight hundred* dollars, or for a larger sum, at any time within one year from the date hereof, the following described real estate of said deceased, for the purpose of distribution, namely: [Describe the real estate].

But if, notwithstanding, you deem it best to sell said real estate at public auction, you are required to give notice of the time and place of such sale, by publishing a notification thereof once in each week, for three successive weeks, in the *Salem Observer*, a newspaper published in *Salem*, and, within one year after such sale, return your affidavit of having given such notice, with a copy thereof, to the Probate Court.

Witness, *Nathan S. Ames*, Judge of said Court, at *Salem*, this *first day of January*, in the year of our Lord one thousand eight hundred and ninety-seven.

*Judah S. Rankin*, Register.

The deed given under this license for the private sale is the same in form as that of an administrator conveying real estate at private sale for the payment of debts, etc.<sup>1</sup> If it is deemed best to sell at auction, the administrator can do so under this license, proceeding as in a sale under a license to sell real estate for the payment of debts, etc.<sup>2</sup>

#### SPECIFIC PERFORMANCE.

When a person has become legally bound to make a conveyance of real estate, by an agreement in writing, and dies before the conveyance is made, the probate court may enforce a specific performance of such agreement, upon a petition therefor presented by any person interested in the conveyance. Notice of the petition must be given to all other persons interested to appear and show cause for or against the prayer of the petition ; and the court may then order the administrator to make the conveyance.<sup>3</sup>

#### INSOLVENCY.

If, after the lapse of a year from the date of the approval of the administrator's bond, it appears probable that the estate will be insolvent, the administrator must so represent it to the court. This representation is in the following form :—

<sup>1</sup> See page 183.

See page 177.

<sup>3</sup> P. S., c. 142, § 1.

# ADMINISTRATION ON INTESTATE ESTATES. 211

To the Honorable the Judge of the Probate Court in and for the County of *Essex* :

Respectfully represents *John Smith*, administrator of the estate of *Thomas Smith*, late of *Salem*, in said county of *Essex*, merchant, deceased, appointed on the *first* day of *January*, A. D. 1894, that within three months from his said appointment he caused notice thereof to be given as ordered by the court, that the debts claimed as owed by the deceased at the time of his death, according to the list hereto appended, amount to \$1,250.00

The necessary funeral expenses to.....	150.00
The allowance by the court for necessaries to the widow to.....	125.00
The charges of administration, including future probable charges, to....	300.00

Amounting in the whole to the sum of.....\$1,825.00

That all the estate of the deceased known to be chargeable with the payment thereof is as follows, viz.:

Real estate not exceeding in value.....\$1,000.00

Personal estate not exceeding in value..... 300.00

And other personal estate not mentioned in

the inventory.....	25.00	1,325.00
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Balance.....	\$500.00
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And your petitioner believes that said estate will probably be insolvent, for the reason that *the assets are insufficient to pay said debts and charges in full* ; he therefore prays that two or more fit persons be appointed commissioners to receive and examine all claims of creditors against the estate, and return a list of all claims laid before them, with the sum allowed on each claim, pursuant to the law in such case made and provided.

Dated this *tenth* day of *January*, A. D. 1895.

*John Smith*, Adm.

*Essex*, ss. *Jan. 10*, A. D. 1895. Then personally appeared said *John Smith*, and made oath that the above is a correct rep-

resentation of the probable condition of said estate, according to the best of his knowledge and belief.

Before me, *Samuel Knapp*, Justice of the Peace.

The list of debts which must be appended to the representation of insolvency should be in the following form :—

#### A LIST OF CREDITORS.

NAME OF CREDITOR.	RESIDENCE OR USUAL PLACE OF BUSINESS.	NATURE OF DEBT.	SECURITY.	AMOUNT.
<i>Thomas Ands,</i>	<i>Salem, Mass.,</i>	<i>Groceries,</i>	<i>None,</i>	<i>\$67.00</i>
<i>Walter Foss,</i>	<i>Danvers, Mass.,</i>	<i>Loan,</i>	<i>"</i>	<i>300.50</i>
<i>Samuel Stone,</i>	<i>Salem, Mass.,</i>	<i>Labor,</i>	<i>"</i>	<i>18.50</i>
<i>Henry Allen,</i>	<i>" "</i>	<i>"</i>	<i>Pledge,</i>	<i>26.00</i>
<i>James Barlow,</i>	<i>" "</i>	<i>Book Acc't,</i>	<i>None,</i>	<i>250.00</i>
<i>Philip Ames,</i>	<i>Beverly, Mass.,</i>	<i>Loan,</i>	<i>"</i>	<i>588.00</i>
				<i>\$1,250.00</i>

The court may, instead of appointing commissioners to do so, receive and examine the claims of creditors, allow such as should legally be allowed, and cause a list of all claims presented for proof, with the amount allowed or disallowed on each claim, to be made and certified by the register. In such a case the court must order the administrator to give to creditors notice of the times when and places where their claims will be examined, as commissioners are required to do.<sup>1</sup>

The administrator will usually indicate to the court two or more fit persons whom it is desirable to

<sup>1</sup> P. S., c. 137, §§ 4, 5. See P. S., c. 137, § 9.

appoint as commissioners to examine the claims against the estate. It is desirable, but not necessary, that one of them be a lawyer.

The decree of the court will be in the following form :—It appearing “ that the estate of said deceased will probably be insufficient for the payment of his debts, it is decreed that *Andrew Washington of Salem and Samuel L. Wiggin of Danvers, both in said county of Essex*, be appointed commissioners to receive and examine all claims of creditors against the estate of said deceased and to return a list of all claims laid before them, with the sum allowed on each claim.”<sup>1</sup>

When one of the commissioners dies or resigns before his duties are fully performed, or when he unreasonably neglects to make the return required by law, or is removed, the probate court may appoint in his stead a new commissioner, who will have the same powers and perform the same duties in reference to the proof of claims as if he had been originally appointed.<sup>2</sup>

The application for such new commissioner may be made by any person interested, and is as follows :—

To the Honorable the Judge of the Probate Court in and for the County of *Essex* :

Respectfully represents *John Smith*, administrator of the estate of the deceased person hereinafter named, that *Andrew Washington and Samuel L. Wiggin* were appointed commissioners upon the insolvent estate of *Thomas Smith*, late of *Salem*, in said county of *Essex*, merchant, deceased, intestate, on the *thirty-first* day of *January*, A. D. 1894, and that said *Samuel L. Wiggin* has since deceased [or, resigned; or, been removed; etc.].

<sup>1</sup> P. S., c. 137, § 2.

<sup>2</sup> P. S., c. 137, § 6.



Wherefore your petitioner prays that a new commissioner may be appointed in place of said *Samuel L. Wiggin*, and that the time for taking proof of claims and making returns thereof may be extended.

Dated this *second* day of *April*, A. D. 1894.

*John Smith.*

The time of extension will be six months from the time of such new appointment.<sup>1</sup>

The following is the form of the warrant issued by the probate court to the commissioners :—

#### COMMONWEALTH OF MASSACHUSETTS.

*Essex*, ss.

PROBATE COURT.

[SEAL] To *Andrew Washington of Salem and Samuel L. Wiggin of Danvers, both in said County of Essex :*

You are appointed commissioners to receive and examine all claims of creditors against the estate of *Thomas Smith*, late of *Salem*, in said county, *merchant*, deceased.

You are to appoint convenient times and places for your meetings, first being sworn to the faithful discharge of your duties, and by mail or otherwise give the administrator and all known creditors (whose names and residences he is required to furnish to you fourteen days before your first meeting) at least seven days' written notice of the time and place of each meeting, and cause notice to be published once in each week for three successive weeks, in the *Salem Observer*, a newspaper published in *Salem*, the last publication to be one day at least before your first meeting. You may examine any claimant on oath (which either of you may administer), and if he refuses to take such oath or to answer fully all questions, you may disallow his claim. If a creditor has security, you will deduct the value thereof from the amount of the claim, and allow the balance only ; estimating such value yourselves, unless the

<sup>1</sup> P. S., c. 137, § 9.

same is determined by a sale of the security by agreement between the creditor and administrator; but if the creditor waives his security, he may prove his whole claim; in either case you will state the facts in your report. Six months from the date hereof are allowed to the creditors to present and prove their claims; after which time you will return to said court, with this commission, a list of all claims presented, whether allowed or not, with the sums you allow on each, computing the net amount due *December 1st*, A. D. 1893, the time of the death of the deceased, with interest on claims expressly bearing interest, and rebate of interest on claims not on interest and not then matured, stating in separate classes: First, debts entitled to a preference under the laws of the United States; second, public rates, taxes and excise duties; third, wages or compensation, to an amount not exceeding one hundred dollars, due to a clerk, servant or operative, for labor performed within one year next preceding the death of such deceased person, or for such labor so performed for the recovery of payment for which a judgment has been rendered; and, fourth, debts due all other persons; specifying, in separate lists, also, those due from the deceased individually and as a member of any partnership.

Witness, *Allen W. Doane*, Esquire, Judge of said Court, at *Newburyport*, this *thirty-first* day of *January*, in the year of our Lord one thousand eight hundred and ninety-four.

*John S. Appleton*, Register.

The commissioners must be sworn before entering upon their duties,<sup>1</sup> and a certificate of the oath in the following form attached to the warrant:—

*Essex*, ss. *February 4*, A.D. 1894. Then personally appeared the above-named commissioners, and made oath that they would faithfully and impartially execute the duties assigned them by the foregoing warrant.

Before me, *Marcus Bergin*, Justice of the Peace.

<sup>1</sup> P. S., c. 137, § 3.

If the court so orders, the commissioners must then cause to be published in the newspaper named in the warrant once in each week, for three successive weeks, the last publication to be one day at least before the date of the first meeting, a notice of such meeting. The notice must be substantially in the following form:—

Estate of *Thomas Smith*, late of *Salem*, in the county of *Essex*, deceased, represented insolvent.

The subscribers, having been appointed by the Probate Court for said county, commissioners to receive and examine all claims of creditors against the estate of said *Thomas Smith*, hereby give notice that six months from the *thirty-first* day of *January*, A. D. 1894,<sup>1</sup> are allowed to creditors to present and prove their claims against said estate, and that they will meet to examine the claims of creditors at *their office, 110 Essex street, in said Salem*, on the *fourteenth* day of *March* next, at *ten o'clock* in the forenoon.

*Salem, February 4, A. D. 1894.*

*Andrew Washington,* }  
*Samuel L. Wiggin,* } Commissioners.

Fourteen days at least before the date of the meeting the administrator must furnish to the commissioners the names and addresses of all creditors and those who claim to be such; and seven days at least before said meeting the commissioners must give written notice by mail or otherwise of the time and place of said meeting to the administrator and all said creditors known to them.<sup>2</sup> This is usually done by having copies of the advertisement in the newspaper struck off from the same type on a sufficient number of postal cards, which are then addressed and posted in the mail.

<sup>1</sup> The date of the decree.

<sup>2</sup> P. S., c. 137, § 3.

At the hearing, which may be formal or informal, as the commissioners please, they may examine claimants and witnesses under oath, which either of the commissioners may administer, and if a claimant refuses to take the oath, or to answer fully all questions, they may disallow his claim.<sup>1</sup>

If a creditor has security for his claim the commissioners should deduct the value thereof from the amount of the claim, and allow the balance only; unless the creditor would prefer to give up his security and prove his claim in full as an unsecured creditor. The value of the security may be determined by the commissioners, or it may be sold by agreement between the creditor and the administrator, when the commissioners will take the net proceeds of such sale to be its value. In either case the commissioners must make a full report of the facts.

Creditors have six months from the date of the decree to present and prove their claims.<sup>2</sup> The appointed meeting is for the convenience of all parties. But at any time within the six months claims can be presented and approved. Other meetings may be held by the commissioners at any time within the six months, notice of which having been given to each creditor by mail seven days at least before the date thereof.<sup>3</sup>

Claims should be allowed and reckoned as they were at the date of death of the deceased. Where a claim is one expressly bearing interest, interest should be reckoned to the date of death only. Where a claim is not yet due and does not bear interest, interest on the amount of the claim for the time between the date

<sup>1</sup> P. S., c. 137, §§ 7, 8.

<sup>2</sup> P. S., c. 137, § 3.

<sup>3</sup> P. S., c. 137, § 9.

of the death of the deceased and the maturity of the claim should be reckoned thereon, and deducted from the amount of the claim, allowing the balance only.

The court may in all cases, if it appears that a just and equitable distribution of the estate requires it, allow such further time, not exceeding eighteen months from the original appointment or order, as it may deem proper for the proof of claims; and, in case of an appeal as hereinafter provided, it may extend the time to a date not more than one month beyond the final decision of such appeal.<sup>1</sup>

At the end of six months, or of such further time as the court may allow, the commissioners must report to the court, and return their commission.<sup>2</sup> The report must give a list of all claims presented to the commissioners, whether allowed or not, with the sums allowed and the sums disallowed on each. These claims must be arranged in classes, viz. :—

*First*, debts entitled to a preference under the laws of the United States ;

*Second*, public rates, taxes, and excise duties ;

*Third*, wages or compensation, to an amount not exceeding one hundred dollars, due to a clerk, servant or operative, for labor performed within one year next preceding the death of such deceased person, or for such labor so performed for the recovery of payment for which a judgment has been rendered ; and,

*Fourth*, debts due all other persons.<sup>3</sup>

If the deceased was a member of a firm, and any of the claims proved were against him as such partner, such claims must be stated and treated separately.<sup>4</sup>

<sup>1</sup> P. S., c. 137, § 9.

<sup>3</sup> P. S., c. 137, § 1.

<sup>2</sup> P. S., c. 137, § 3.

<sup>4</sup> P. S., c. 137, § 21.

The following is the form of the report:—

To the Honorable the Judge of the Probate Court in and for the County of *Essex*:

The subscribers, commissioners appointed by said court to examine all claims of creditors against the estate of *Thomas Smith*, late of *Salem*, in said county, *merchant*, deceased, respectfully report as follows:

Having first been sworn, and having given notice according to law and the order of court, we received and examined all such claims presented to us, and the following is a true list thereof and of the sums allowed on each:

NAMES OF CLAIMANTS.	[State any finding of fact which may show that a claim is preferred.]	SUMS CLAIMED	SUMS ALL'W'D	SUMS DISALLOWED.
	NATURE OF CLAIMS.			
<i>United States,</i>	<i>Import duties,</i>	\$ 17.50	\$ 17.50	
<i>City of Salem,</i>	<i>Taxes,</i>	70.00	70.00	
<i>John Alden,</i>	<i>Servant, labor performed within one year of death of the deceased,</i>	90.00	80.00	\$10.00
<i>Thomas Ands,</i>	<i>Groceries,</i>	67.00	67.00	
<i>Walter Foss,</i>	<i>Money loaned,</i>	300.50	250.00	50.50
<i>Samuel Stone,</i>	<i>Labor, 1890,</i>	18.50		18.50
<i>James Barlow,</i>	<i>Book account,</i>	250.00	150.00	100.00
<i>Philip Ames,</i>	<i>Money loaned,</i>	710.00	588.00	122.00
<i>Henry Allen,</i>	<i>Labor,</i>	26.00	16.00	Pledge of the value of ten dollars deducted from am't of debt.
<i>Wm. Andrews,</i>	<i>Book acc't against the deceased as a partner in the firm of Brooks &amp; Smith,</i>	118.00	118.00	

Andrew Washington, }  
 Samuel L. Wiggin, } Commissioners.



Thirty days after the report of the commissioners has been filed in the court (no notice need be given of such filing), if no objection by any party interested is made thereto,<sup>1</sup> it will be confirmed, and if the administrator's account has been allowed, the following decree will be made:—

Thirty days having expired since the return of the foregoing report, and it appearing by the account of the administrator of the estate of said deceased, allowed by this court on the *second* day of *December*, A. D. 1894, that there is a balance of *five hundred and eighty-seven* dollars in his hands for distribution.

It is decreed that the sum of *five hundred and eighty-seven* dollars be distributed in such sums and in such proportions as is provided by law, to the creditors whose claims have been finally allowed, and that an order therefor be issued accordingly, with the direction to deposit in the *Salem* Savings Bank, in the name of the Judge of Probate, any sums remaining unpaid after six months.

The form of the order of distribution issued on such decree is, and the proceedings in payment to creditors, etc., are, the same as in distribution to heirs.

Any person whose claim is disallowed in whole or in part, or the administrator, or an heir or another creditor of the estate who is dissatisfied with the allowance of a claim may appeal from the decision of the commissioners, or of the court; and the claim must thereupon be determined at common law in the county where the estate is being settled. If the demand exceeds three thousand dollars in the county of Suffolk, or one thousand dollars in any other county, the appeal must be directly to the supreme

<sup>1</sup> P. S., c. 137, § 18.

<sup>2</sup> See pages 202 and 203.

court, otherwise to the superior court; and in either case it must be tried and determined like an ordinary action.<sup>1</sup> Such appeal must be claimed and notice thereof given at the registry of probate within thirty days after the return of the commissioners, or when the court itself receives and examines the claims, within thirty days after the allowance or rejection of the claim. If the appeal is by the administrator he must give notice thereof to the creditor within the thirty days. The appeal must be entered at the court appealed to, which is held next after the expiration of the thirty days.<sup>2</sup>

After claiming such appeal the parties may waive a trial at law and submit the claim to the determination of arbitrators to be agreed on between them and appointed by a rule of the probate court, in which case the appeal cannot be entered at the court appealed to; and the award of such arbitrators, if accepted by the court, is conclusive.<sup>3</sup>

The party prevailing upon such an appeal is entitled to his costs, which if recovered against an administrator may be allowed to him in his account.<sup>4</sup>

If a creditor, whose claim is disallowed by the commissioners or by the probate court, and who for any other cause than his own neglect, omits to duly claim or prosecute his appeal, the supreme court may, upon his petition, if it appears that justice requires a further examination of his claim, allow him to claim and prosecute his appeal, if the petition is brought within two

<sup>1</sup> P. S., c. 137, § 11.

<sup>2</sup> P. S., c. 137, § 12. The creditor must file a statement of his claim like a declaration in the appellant

court. For further proceedings, see § 13.

<sup>3</sup> P. S., c. 137, § 14.

<sup>4</sup> P. S., c. 137, § 15.

years after the return of commissioners, and within four years after the date of the administrator's bond.<sup>1</sup>

When an appeal has been duly claimed the court may wait until it is settled before making the decree of distribution; or, it may, in its discretion, order the administrator to retain in his hands sufficient assets to meet such proportion of the claim of the appealing creditor as the other creditors are paid, and to distribute the rest among those creditors who have proved their claims.<sup>2</sup>

The court may at any time order dividends in a similar manner.<sup>3</sup> And may order new assets to be distributed in the same manner, if the creditors have not already been paid in full.<sup>4</sup>

If the assets are sufficient to pay all the claims proved in full the administrator must pay them in full; and if any other debt is afterwards recovered against him, he will be liable only to the extent of the assets then remaining.<sup>5</sup> If there are two or more such creditors, the assets, if insufficient to pay their demands in full, must be divided among them in proportion to the amount of their debts.<sup>6</sup>

After twenty years the court may order unclaimed dividends to be paid to the other creditors, etc. See P. S., c. 137, §§ 25, 26.

An administrator must settle his account within six months after the final determination of the creditors, or within such further time as the court may allow.<sup>7</sup>

For proceedings upon contingent claims which could

<sup>1</sup> P. S., c. 137, § 16. See § 17.

<sup>2</sup> P. S., c. 137, § 18.

<sup>3</sup> P. S., c. 137, § 19.

<sup>4</sup> P. S., c. 137, § 20.

<sup>5</sup> P. S., c. 137, § 22. See § 24.

<sup>6</sup> P. S., c. 137, § 23. See § 24.

<sup>7</sup> P. S., c. 137, § 27.

not be proven with ordinary claims, see P. S., c. 137, §§ 28-30.

For actions by creditors brought during pendency of insolvency proceedings, see P. S., c. 137, §§ 31-33.

*Ancillary Administration.*—If a non-resident person dies insolvent, his estate found in this commonwealth must, so far as practicable, be so disposed of that all his creditors here and elsewhere may receive each an equal share in proportion to their respective debts.<sup>1</sup>

To this end, the estate must not be transmitted to the foreign executor or administrator until all the creditors who are citizens of this commonwealth have received the just proportion that would be due to them if the whole estate of the deceased, wherever found, that is applicable to the payment of common creditors, were divided among all the creditors in proportion to their respective debts, without preferring any one species of debt to another; and no creditor who is not a citizen of this commonwealth can be paid out of the assets found here, until all those who are citizens have received their just proportion.<sup>2</sup>

If there is any residue after such payment to the citizens of this commonwealth, it may be paid to any other creditors who have duly proved their debts here, in proportion to the amount due to each of them, but no one can receive more than would be due to him if the whole estate were divided ratably among all the creditors. The balance may be transmitted to the foreign executor or administrator; or if there is none, it must, after the expiration of four years of the appoint-

<sup>1</sup> P. S., c. 138, § 3.

<sup>2</sup> P. S., c. 138, § 4.

ment of the administrator, be distributed ratably among all creditors, both citizens and others, who have proved their debts in this commonwealth.<sup>1</sup>

#### SETTLEMENT OF ESTATES OF PERSONS PRESUMABLY DEAD.

Whenever a person has disappeared and his whereabouts are unknown to his family, kindred, business associates or intimate friends, leaving property in this commonwealth, any other person interested in such estate may represent the facts to the probate court which would have jurisdiction of such absentee's estate if he were actually dead, accompanied by a petition for administration, and supported by an affidavit of any credible person that the affiant believes such absent person is dead. The court thereupon orders a notice, in such form as it prescribes, to be published in any newspapers within or without the commonwealth once a week for three successive weeks, and for such further time as it deems reasonable, not exceeding one year, and to be posted in two or more conspicuous places in the city or town where the absentee last resided, or was last known to have been, either temporarily or permanently, and to be further served upon all persons interested in said estate, in such manner as seems practicable; and after satisfactory evidence that such notice has been given and served in accordance with such order, if no satisfactory objection is made thereto, the court must presume such absentee, for the purposes of administering his estate, to be dead, and must appoint the petitioner or some

<sup>1</sup> P. S., c. 138, § 5.

other suitable person who is entitled thereto<sup>1</sup> administrator of the estate of such absent person.<sup>2</sup>

Every administrator thus appointed must give bonds, with sufficient sureties, in such sum as the court may order, payable to the judge of said court and his successors, and with conditions substantially as in ordinary administration, and with the further condition to obey all orders and decrees that may be made by said court.<sup>3</sup>

All laws relating to the duties of administrators, or to the settlement, sale, payment of debts, division or distribution of estates of deceased persons, not inconsistent herewith, apply to the administration or settlement of estates of such absent persons, and such administrators may be authorized to sell any estate coming to their hands, whether real or personal, for the support of the wife or children of the absentee, in addition to the general authority that may be granted for such sales under the general laws, and such support may be continued in the discretion of the court; and any such administrator is entitled, under license of court, to execute a lease of any such real estate for a term of years, and to collect all rents, and generally to manage the real estate under direction of the court; but no distribution of the estate can be made except as follows:—<sup>4</sup>

Whenever, upon petition of the administrator or any other person interested in the settlement of the estate of any such absent person, it is proved by affidavit or other competent evidence that such absentee has

<sup>1</sup> See page 71.

<sup>2</sup> St. 1897, c. 447, § 2.

<sup>2</sup> St. 1897, c. 447, § 1.

<sup>4</sup> St. 1897, c. 447, § 3.



been missing and unheard from, or that his whereabouts have been unknown to his family, kindred, business associates or friends for fourteen consecutive years prior to filing the petition for distribution, such absent person must be presumed to be dead, and such presumption is conclusive for all purposes and against all persons except such absentee, and the court must decree distribution as if he had deceased on a day fourteen years after the time when he is proved to be last alive, or was last known to be alive, and the title to all remaining real estate thereupon vests in the heirs or devisees of such absentee.<sup>1</sup>

Whenever in the settlement of any estate of a deceased person it is made to appear that any heir, legatee or distributee has been absent and unheard from for fourteen consecutive years, the court must order notice as provided above, and, thereafter, if it is not proved that such absent person is still alive, he must be presumed to be dead, and the estate in process of settlement must be distributed as if he had deceased on a date fourteen years after the time when he was proved to have been last alive, and such presumption is conclusive for all purposes and against all persons except the absentee.<sup>2</sup>

No heir, devisee, legatee or distributee can receive any estate, share or legacy under these provisions until he has given a bond, with sufficient surety or sureties, approved by the court, and in such sum as it orders, payable to the judge of said court and his successors, and with condition to restore any share or estate received or acquired by him, or its equivalent

<sup>1</sup>St. 1897, c. 447, § 4.

<sup>2</sup>St. 1897, c. 447, § 5.

in money, without interest, to such absentee whose estate was received, vested or distributed, if he returns and claims it. Said bond remains in full force and effect for a term of eight years from its date, and no longer.<sup>1</sup>

No sale of any property in the settlement of any estate under these provisions, whether real or personal, and no sale of any property vested hereunder, can be avoided by the fact that the absent person whose estate was so settled, vested or alienated, is alive, or that death occurred at any other time than was presumed by the court in making the order of sale, partition or distribution, and no act of the administrator can be deemed invalid or unlawful from or by reason of the fact that such absentee was alive at the time thereof.<sup>2</sup>

<sup>1</sup> St. 1897, c. 447, § 6.

<sup>2</sup> St. 1897, c. 447, § 7.

## CHAPTER III.

### ADMINISTRATION ON TESTATE ESTATES.

#### DEPOSIT OF WILLS.

The will of a living person may be deposited in the registry of probate, to be kept subject to the order of the testator while living, and the person to whom it is to be delivered after his death, the fee for such custody being one dollar, payable in advance. A certificate of such deposit will be given by the register.<sup>1</sup>

Every will so deposited must be enclosed in a sealed wrapper, with an endorsement thereon of the name and place of residence of the testator, and of the day when and the person by whom it is deposited, and the wrapper may also have endorsed upon it the name of a person to whom the will is to be delivered after the death of the testator.<sup>2</sup>

During the lifetime of the testator such will can be delivered only to the testator himself, or in accordance with his order in writing duly witnessed and sworn to by such witness; and after his death only to the person named in the endorsement, if such person demands it.<sup>3</sup>

If a will is not called for by the person named in the endorsement, if any, it must be publicly opened

<sup>1</sup> P. S., c. 127, § 9.

<sup>3</sup> P. S., c. 127, § 11.

<sup>2</sup> P. S., c. 127, § 10.

at the first probate court held after notice of the testator's death, and must be retained in the registry until it is so opened; or, if the jurisdiction of the case belongs to another court, it must be delivered to the executors or other persons entitled to the custody thereof, to be by them presented for probate in such other court.<sup>1</sup>

#### CONCEALMENT OF WILLS.

Every person who has the custody of a will, other than a register of probate, must, within thirty days after notice of the death of the testator, deliver it into the probate court having jurisdiction of the case, or to the executors named in the will, who must themselves deliver it into such court within said time; and if any executor or other person neglects without reasonable cause so to deliver a will, after being duly cited for that purpose by such court, he may be committed to jail by warrant of the court, there to be kept in close custody until he delivers it as above; and he is further liable to any party aggrieved for the damage sustained by him by reason of such neglect.<sup>2</sup>

If any person claiming to be interested in the estate of a person deceased suspects any one of retaining, concealing, or conspiring with others to retain or conceal, a will or testamentary instrument of the deceased, he may make a complaint thereof to the probate court.<sup>3</sup> The complaint is substantially in the following form:—

<sup>1</sup> P. S., c. 127, § 12.

<sup>2</sup> P. S., c. 127, § 13.

<sup>3</sup> P. S., c. 127, § 14; *Stebbins v. Lathrop*, 4 Pick. 33 (1826).

To the Honorable the Judge of the Probate Court in and for the County of *Essex* :

*Ann Jones* of *Salem*, in the County of *Essex*, on oath complains that she has good cause to suspect, and does suspect, that *John Jones* of *Dancers*, in the county of *Essex*, fraudulently retains or conceals the will or testamentary instrument of *Thomas Jones*, late of *Salem*, in the county of *Essex*, merchant, deceased. That your complainant is the widow of the deceased, and is interested in said estate.

Wherefore she prays that said *John Jones* may be cited to appear before said court, to be examined upon oath upon the matter of this complaint, and that such further proceedings may be had in the premises as the law requires.

Dated this *first* day of *April*, A. D. 1893.

*Ann Jones.*

This complaint must be sworn to, and a certificate of the oath, as follows, filed in the court:—

*Essex*, ss. *April 1*, A. D. 1893. Then personally appeared *Ann Jones*, and made oath that the above complaint, by her subscribed, is true.

Before me, *Andrew Wilson*, Justice of the Peace.

Let citation issue as prayed for.

*Atherton S. Brown*, Judge of Probate Court.

Dated *April 1*, 1893.

The citation issued upon the complaint is in the following form:—

#### COMMONWEALTH OF MASSACHUSETTS.

*Essex*, ss.

#### PROBATE COURT.

On the foregoing complaint, the complainant is ordered to cite said *John Jones* to appear at a Probate Court, to be held at *Salem*, in said county of *Essex*, on the *second* day of *May*, A.D. 1893, at nine o'clock in the forenoon, and be examined on oath

upon the matter of said complaint by serving *him* with an attested copy of said complaint, and of this citation thereon, *ten* days at least before said court.

Witness, *Amos A. Adams*, Esquire, Judge of said Court, this *fourth* day of *April*, in the year one thousand eight hundred and *ninety-three*.

*John S. Towne*, Register.

I have served the foregoing citation as therein required.

*Ann Jones*.

*Essex*, ss. *May 1*, A. D. 1893. Personally appeared *Ann Jones*, and made oath to the truth of the above return by her subscribed.

Before me, *Justus Overnin*, Justice of the Peace.

On the hearing upon this complaint all interrogatories and answers must be in writing, signed by the party examined, and filed in the court.<sup>1</sup>

If the person cited refuses to appear and submit to examination or to answer such interrogatories as are lawfully propounded to him, or to obey any lawful order of the court, he may be committed to jail by warrant of the court, there to remain in close custody until he submits to its order.<sup>1</sup>

On such a complaint the court may in its discretion award costs to be paid by either party, and may issue execution therefor.<sup>1</sup>

#### DECLINATION OF EXECUTOR.

When a person dies leaving a writing purporting to be his or her last will, the person named therein as executor should either duly present it to the probate court and ask for its probate, or decline in writing to

<sup>1</sup> P. S., c. 127, § 14.



accept the trust. If he or she concludes to decline, a declination in writing should be filed in the probate court. The following is the prescribed form:—

To the Honorable the Judge of the Probate Court in and for the County of *Essex* :

It being inconvenient for me [or, *us*<sup>1</sup>] to discharge the duty of executor [or, *executrix*] of the last will and testament of *Thomas Smith*, late of *Salem*, in said county of *Essex*, merchant, deceased, I [or, *we*] do hereby decline that trust.

Dated this *second* day of *October*, A. D. 1891.

*John Smith.*

#### PROBATE OF THE WILL.

If the executor named in a will accepts the trust he should file the will in the probate court for the county of which the testator was an inhabitant or resident at the time of his death,<sup>2</sup> together with the petition praying for its allowance and for his appointment as executor. It makes no difference whether twenty years have elapsed since the testator's death or not.<sup>3</sup> A married woman may be an executrix without any act or assent of her husband.<sup>4</sup> The petition is in the following form:—

To the Honorable the Judge of the Probate Court in and for the county of *Essex* :

Respectfully represents *John Smith* of *Salem*, in the county of *Essex*, that *Thomas Smith*, who last dwelt in *Salem*, in said county of *Essex*, merchant, died on the *twenty-fifth* day of *September*, in the year of our Lord one thousand eight hundred

<sup>1</sup> If more than one executor declines make it plural.

<sup>3</sup> *Shumway v. Holbrook*, 1 Pick. 114 (1822); *Haddock v. Boston &*

<sup>2</sup> *Harvard College v. Gore*, 5 Pick. *Maine R. R.*, 146 Mass. 155 (1888).  
370 (1827).

<sup>4</sup> P. S., c. 147, § 5.

and ninety-one, possessed of goods and estate remaining to be administered, leaving as widow<sup>1</sup>—husband<sup>2</sup>—his [or, *her*] only heirs-at-law and next of kin, the persons whose names, residences and relationship to the deceased are as follows, viz.: [Write here the names, etc., of the heirs-at-law and next of kin as if the deceased died intestate, and as in the petition for the appointment of an administrator. The names of legatees and devisees are not to be inserted unless they are heirs-at-law or next of kin. Follow the petition for appointment of an administrator exactly (see page 73) in this part of the petition].

That said deceased left a will *and a codicil*<sup>3</sup> herewith presented, wherein† your petitioner [or, -s] *is* [or, *are*] named executor [or, -s, or, -trix].\*

Wherefore your petitioner prays that said will [or, *and codicil*] may be proved and allowed and letters testamentary issued to him [or, *them*; or, *her*], and certifies that the statements herein contained are true to the best of his [or, *their*; or, *her*] knowledge and belief.

Dated this *second* day of *October*, A. D. 1891.

*John Smith.*

This must be sworn to, as in a petition for the appointment of an administrator, and a certificate of the oath attached thereto.

If all the heirs at law and next of kin assent to the petition in writing, the instrument will thereupon be proved without further notice. If all do not so assent, they must be cited into court by delivering to each and every one of them that do not so assent, in hand a copy of the citation issued by the

<sup>1</sup> Cross out the word "widow" if the deceased was a single man or widower, or a woman.

<sup>2</sup> Cross out the word "husband" if the deceased was a single woman or a widow or a man.

<sup>3</sup> Add these words "and a codicil," if there is one, and if more than one give the number of them instead of the article "a." If there is no codicil cross out in the blank the printed words, "and codicil."

court fourteen days at least before the return day named therein, or by publishing it once in each week, for three successive weeks, in a newspaper named therein, the last publication to be one day, at least, before the return day, and by mailing, post-paid, or delivering a copy of the citation to all known persons interested in the estate, who have not duly assented, seven days at least before the return day. The copy to be delivered or mailed to parties interested may be made on blank citations applicable to the case, or, if the citation is published, the printed advertisement may be cut from the paper and mailed in an envelope, sealed or unsealed, or marked copies of the paper may be mailed or delivered. The return on this citation must show the manner of giving notice; and must be sworn to, and a certificate of the oath attached as in other cases.

If any one of the heirs at law or next of kin is a person under age or insane, and has no legal guardian, the court must appoint some person a guardian *ad litem* or next friend to act for him or her in the matter. The appointment is in the following form:—

#### COMMONWEALTH OF MASSACHUSETTS.

*Essex*, ss.

#### PROBATE COURT.

At a Probate Court holden at *Salem*, in said county, on the *second* day of *October*, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas, in the matter of the petition for the probate of the will of *Thomas Smith*, late of *Salem*, in said county of *Essex*, merchant, it appears that *Ann Saunders* is a minor [or, *an insane person*], and interested in said case, and has no legal guardian, therefore *Joseph Lucy*, of *Beverly*, in the county of

*Essex*, is hereby appointed to act as guardian *ad litem* or next friend for such person, to represent *her* interest in said case.

*Josiah Randall*, Judge of Probate Court.

The duty of the guardian *ad litem* is to see if the interest of the person he represents is injured by the will, and if so to discover if the instrument was the last will of the deceased. His report should be in the following form :—

Having fully examined and considered the matter of the petition for the probate of the above-named will, I hereby [or, *do not*] assent to the probate thereof. *Joseph Lucy*.

If the guardian *ad litem* does not assent to the will he should represent his ward and protect his rights.

Though the parties all assent or do not contest the probate of the will the court cannot allow it without positive legal evidence of its due execution, etc. One witness, at least must be called and examined in every case. The necessary questions are four in number, viz :—

1. Was the testator of age when he signed the instrument?

2. Was he of disposing mind?

3. Did all three witnesses sign their names in his presence?

4. Did he sign his name, or was his name signed by some person authorized so to do, in their presence, and at the time of, or before they signed their names as witnesses?

If all the answers are, *yes*, the instrument will be allowed. If *no* is the answer to either of the first three questions it cannot be allowed. *No* may be the

answer to the last question and yet the will can be allowed, as it is not necessary that the testator should sign in the presence of the witnesses. And if he is disabled he may have some one sign his name for him, that fact being stated.

If the will is contested, or if it is insisted upon,<sup>1</sup> all three witnesses must be called and examined unless the examination of one or two of them is expressly waived.

If an attesting witness is dead, proof of his handwriting is *prima facie* evidence that he duly attested the will.<sup>2</sup>

If a subscribing witness is without the commonwealth, the court will issue a commission to take his deposition, after the will has been filed in the court: and the original will may accompany the commission, on proper security being given for its due return. If an interpreter is employed by the magistrate taking such testimony, he should clearly state in his return that such interpreter was sworn. The deposition must be prepared and written out (if it is done by the party interested in the probate of the will) in the presence of the witness.<sup>3</sup>

In proving wills, the executor has the right to open and close.<sup>4</sup> As to introduction of evidence and

<sup>1</sup> *Chase v. Lincoln*, 3 Mass. 236 (1807). In this case one of the witnesses had gone, "as was understood, into some part of the district of Maine, and the executor had caused inquiry to be made for him, but had not succeeded in finding his present place of abode," and the court refused to examine the two

witnesses produced.

<sup>2</sup> *Nickerson v. Buck*, 12 Cush. 332 (1853).

<sup>3</sup> *Amory v. Fellowes*, 5 Mass. 219 (1809.)

<sup>4</sup> *Blaney v. Sargeant*, 1 Mass. 335 (1804); *Buckminster v. Perry*, 4 Mass. 593 (1808); *Brooks v. Barrett*, 7 Pick. 94 (1828).

procedure, see the case of *Howes et al., ex'rs, v. Colburn et al.*<sup>1</sup>

If after an appeal has been taken from a decree of the probate court admitting a will to probate, one of the appellants who have identical interests dies, the court can go on and adjudicate upon the matter without issuing a formal notice or citation to the representatives of the deceased appellant, though they are not residents of the commonwealth, but have actual knowledge of the pendency of the appeal, and do not desire to appear to prosecute it.<sup>2</sup>

The probate court, after admitting a will to probate, and after the time for appealing from the decree has passed, may admit to probate a codicil to, or a paper forming a part of, the same will, written upon the back of the same leaf upon which the will was written, if the codicil escaped attention and was not passed upon at the time of the probate of the original will.<sup>3</sup>

The decree allowing a will should show that the heirs at law, next of kin, and all other persons interested, had been duly notified to appear and show cause, if any they had, against the will, and that it appeared that the instrument was the last will of the deceased, and was legally executed, and that the testator, at the time of making the same, was of full age and sound mind; and that the petitioner was a competent person to be appointed executor, and that it is decreed that the instrument is approved and al-

<sup>1</sup> *Howes et al., ex'rs, v. Colburn et al.*, 165 Mass. 385 (1896).

<sup>3</sup> *Waters v. Stickney*, 12 Allen 1 (1866); *Newton v. Seaman's Friend*

<sup>2</sup> *Bonnemort, ex'r, v. Gill et al.* 167 Mass. 338 (1897).

*Society*, 130 Mass. 91 (1881).



lowed as the last will and testament of the deceased, and letters testamentary issued to the petitioner (or other person named), he first giving bond, with sufficient sureties, for the due performance of the trust.

If the executor wishes to give a bond without sureties, and the testator has so requested, he must insert such a prayer in his petition, by making it read after the asterisk (\*) as follows, instead of the form already given:—

And wherein the testator has requested that your petitioner be exempt from giving a surety on his bond.

Wherefore your petitioner prays that said will [*and codicil*] may be proved and allowed, and letters testamentary issued to him [*or, them; or, her*], without giving a surety on his official bond, and certifies that the statements herein contained are true to the best of his knowledge and belief.

Dated this *second* day of *October*, A. D. 1891.

*John Smith.*

This must be duly sworn to as before, and certificate of the oath filed.

If the executor has not been released from giving sureties in the will, all parties in interest, including legatees and devisees and guardians of minors, must assent by signing the following or a similar assent:—

The undersigned, being all the persons interested in the estate who are of full age and legal capacity, other than creditors, and the guardians of persons interested therein, hereby consent that the above-named petitioner be exempt from giving any surety on his bond.

But in all cases when a bond without sureties is given, in addition to this written assent, even when

this is required, notice must be given to creditors by publishing a citation issued by the court upon the petition, once in each week, for three successive weeks, in a newspaper named therein, the last publication to be one day, at least, before the return day named therein, and by mailing, post-paid, or delivering a copy thereof to all known persons interested in the estate, seven days at least before the return day. Creditors are certainly interested in this proceeding, and, it seems to the writer that all known creditors should have a copy of the citation sent to them by mail, or be personally served with a copy thereof.

The decree is the same as when the executor gives sureties, except at the end it should read "giving bond without sureties," instead of "giving bond, with sufficient sureties."

### *Administrator with Will Annexed.*

Where a testator neglects to nominate an executor in his will, or where the person appointed as executor dies before the testator, or becomes incompetent, or declines to serve, or, after being duly cited for that purpose, neglects for twenty days after the probate of the will to file his bond,<sup>1</sup> an administrator

<sup>1</sup> If one of two or more executors thus fail to file bond, the court must grant letters testamentary to the others, if they are competent and willing to accept the trust. P. S., c. 129, § 3; c. 130, § 6.

The court may, however, appoint the executor after the twenty days have expired, if no administrator with the will annexed has been appointed, if he gives bond. P. S., c.

130, § 6.

When a person named as executor in a will is at the time of the probate thereof under the age of twenty-one years, the other executor or executors, if any, are to administer the estate until the minor arrives at full age, when, upon giving bond, he may be admitted as a joint executor. P. S., c. 129, § 4.

will be appointed to settle the estate according to the terms of the will. When a person nominated in a will as executor is at the time of the probate thereof a minor, administration with the will annexed may be granted during his minority, unless there is another executor who accepts the trust.<sup>1</sup> This kind of an administrator is called an "administrator with the will annexed." He takes the place of an executor. He is the one to petition the court for the probate of the will, and for his appointment as such administrator, if the will has not already been proved. The petition for such probate and appointment is similar to that of an executor, except that after the dagger (†) it reads as follows:—

*John Smith was named executor, and has deceased [or, declined to accept the trust; or, is a minor].*

Wherefore your petitioner prays that said will [*and codicil*] may be proved and allowed, and letters of administration, with the will annexed, issued to him, or some other suitable person, and certifies that the statements herein contained are true to the best of his knowledge and belief.

Dated this *second* day of *October*, A. D. 1891.

*Henry Chase.*

Otherwise the forms and proceedings are the same as in the case of probate of a will and the appointment of executor.

*Administrator de bonis non with Will Annexed.*

If an administrator with the will annexed, or a sole or surviving executor dies, resigns, or has been removed, without having completed the settlement of

<sup>1</sup> P. S., c. 130 § 7.

the estate, if there is personal estate of the deceased remaining to be administered to the amount of twenty dollars, or debts to that amount remaining due from the estate, or anything remaining to be performed in execution of the will, an administrator *de bonis non* with the will annexed may be appointed.<sup>1</sup> The petition for such an appointment is in the following form:—

To the Honorable the Judge of the Probate Court in and for the County of *Essex* :

Respectfully represents *Hayden Walters*, of *Georgetown*, in the county of *Essex*, that the will of *Thomas Smith*, late of *Salem*, in said county of *Essex*, merchant, deceased, was duly proved and allowed on the *sixth* day of *November*, A. D. 1891, in said court, and that *John Smith* was appointed executor [or, administrator with the will annexed] thereof, and that said executor has *deceased* [or, *resigned*; or, *been removed*], without having fully executed said will, and that your petitioner is a son of said deceased [or, *requested by the parties interested in said will to settle the estate*].

Wherefore your petitioner prays that he, or some other suitable person, be appointed administrator with the will annexed of the estate of said deceased not already administered, and certifies that the statements herein contained are true to the best of his knowledge and belief.

Dated this *tenth* day of *June*, A. D. 1892.

*Hayden Walters.*

This petition must be sworn to by the petitioner, and the parties in interest must either assent to it in writing or be cited by publication in a newspaper once in each week, for three successive weeks, the last pub-

<sup>1</sup> P. S., c. 130, § 9.

lication to be one day, at least, before the return day, and by mailing post-paid, or delivering a copy of the citation to all devisees and legatees named in said will seven days at least before the return day. Some one having knowledge that the citation was duly served must make return of such service, under oath, stating the manner of service.

*Allowance of Foreign Wills.*

The will of a person residing in another state or country, which has been proved and allowed there according to the laws thereof, or which is there valid without probate, may be proved in this state, provided that the testator at the time of his decease owned property, either real or personal, in the county in which the will is sought to be set up, on which the will might operate. The executor of the will, if there is one, ought to bring the petition, though any party in interest can do so.<sup>1</sup> The following is the form of the petition :—

To the Honorable the Judge of the Probate Court in and for the County of *Essex* :

Respectfully represents *Ann Nelson*, of *Cincinnati*, in the county of *Hamilton*, and State of *Ohio*, that the last will and testament of *John J. Nelson*, late of *Cincinnati*, in the county of *Hamilton*, and State of *Ohio*, deceased, testate, has been duly proved and allowed by the *Probate* Court in and for the county of *Hamilton*, according to the laws of said State of *Ohio*, a copy of which will, and of the probate thereof, duly authenticated, are herewith produced; that said testator, at the time of his decease, had estate in said county of *Essex*, on which said will may operate; that the same ought to be allowed in

<sup>1</sup> P. S., c. 127, § 15.

this State as the last will and testament of said deceased; that your petitioner is the executrix therein named [If some other person interested is the petitioner state here how he is interested]; and therefore prays that the copy of said will may be filed and recorded in the Registry of Probate in said county of *Essex*, pursuant to the statute in that case made and provided; and that letters testamentary may be granted thereon to her, and certifies that the statements made in the foregoing petition are true to the best of his knowledge and belief.

Dated this *tenth* day of *October*, A. D. 1893.

*Ann Nelson.*

This must be sworn to, and a certificate of the oath filed in the probate court.

Upon the receipt of this petition and a duly authenticated copy of the will and of its original probate, or, if such will is valid without probate, a copy of the will or of the official record thereof, duly authenticated by the proper officers having custody of such will or record in such state or country, the court will issue a citation to all parties in interest, which is to be served by publishing it once in each week, for three successive weeks, in a newspaper named therein, the first publication to be thirty days at least before the return day named therein.<sup>1</sup> Upon a return of the service of the same, under oath, a certificate thereof being filed in the court, if there is no objection, the court will make a decree ordering the copy to be filed and recorded,<sup>2</sup> and granting letters testamentary or letters of administration with the will annexed.<sup>3</sup> No other evidence is required.<sup>4</sup>

<sup>1</sup> P. S., c. 127, § 15.

<sup>2</sup> P. S., c. 127, § 16.

<sup>3</sup> P. S., c. 127, § 17.

<sup>4</sup> *Crippen v. Dexter*, 13 Gray 330 (1859); *Shannon v. Shannon*, 111 Mass. 331 (1873).



Where the executors named in a will filed a petition to the probate court, declining the trust, but praying that the will might be admitted to probate, and a third person appointed administrator with the will annexed, notice being issued, setting forth the prayer of the petition, one of the executors can withdraw his declination and pray for his appointment as executor in a writing filed in the court before the petition is acted on ; and the court can appoint him executor without any further or other notice.<sup>1</sup>

The signature of the husband of the testatrix to the petition for appointment of himself as executor, is not "a written consent" to the will, under P. S., c. 146, § 6.<sup>2</sup>

#### BOND.

The bonds of executors are the same as those of administrators, except the condition, which in an executor's bond is as follows :—

The condition of this obligation is such that if the above-bounden *John Smith*, executor of the last will and testament of *Thomas Smith*, late of *Salem*, in said county of *Essex*, merchant, deceased, testate, shall:—

First, make and return to said Probate Court, within three months after his appointment, a true inventory of all the real and personal estate of said deceased which at the time of the making such inventory shall have come to the possession or knowledge of said executor ;

Second, administer according to law and to the will of said deceased all the personal estate of said deceased which may come to the possession of said executor, or of any person for

<sup>1</sup> *Shannon v. Shannon*, 111 Mass. 331 (1873).      <sup>2</sup> *Tyler v. Wheeler*, 160 Mass. 206 (1893).

him, and also the proceeds of any of the real estate of said deceased that may be sold or mortgaged by said executor; and

Third, render upon oath a true account of his administration at least once a year, until his trust is fulfilled, unless he is excused therefrom in any year by said court, and also render such account at such other times as said court may order;

Then this obligation to be void otherwise to remain in full force and virtue.

An executor is exempt from giving a surety on his bond when the testator has ordered or requested such exemption, or that no bond should be taken; or when all the persons interested in the estate who are of full age and legal capacity, other than creditors, certify to the court their consent thereto; but not until all creditors of the estate and the guardian of any minor interested therein have been notified and have had opportunity to show cause against the same. The court may, however, at or after the granting of letters testamentary, require bond with sufficient surety or sureties, if it is of opinion that such bond is required by a change in the situation or circumstances of the executor, or for other sufficient cause.<sup>1</sup>

When two or more persons are appointed executors, none can intermeddle or act as such but those who give bond.<sup>2</sup>

The executor of an executor cannot, as such, administer on the estate of the first testator.<sup>3</sup>

The bonds of administrators with the will annexed are the same as those of executors, except that in the condition they are described as "administrator with

<sup>1</sup> P. S., c. 129, § 8.

<sup>2</sup> P. S., c. 129, § 9

<sup>3</sup> P. S., . 129, § 10.

the will annexed of the estate of," instead of "executor of the last will of."

*Bond to Pay Debts, Legacies, etc.*

The court may allow an executor or an administrator with the will annexed,<sup>1</sup> who is the residuary legatee, to give a bond with sureties to pay debts, legacies, etc., instead of the customary bond. This is the same as the ordinary bond, except the condition, which is as follows:—

The condition of this obligation is such that if the above-bounden *John Smith*, executor of the last will and testament of *Thomas Smith*, late of *Salem*, in said county of *Essex*, merchant, deceased, testate, being residuary legatee in said will, shall pay all debts and legacies of said deceased, and such sums as may be allowed by said Probate Court for necessities to the widow and minor children of said deceased; then this obligation to be void, otherwise to remain in full force and virtue.

*New Bond.*

The proceedings in the matter of a new bond are the same as those in the case of an administrator. See page 104.

*Statement of Property, etc.*

The rule regarding the statement of the executor written on the back of the bond as to the amount of the estate, and the opinion of some official as to the sufficiency of sureties, is the same in reference to executors' bonds as to administrators'. See page 93.

<sup>1</sup> P. S., c. 130, § 8.

## APPOINTMENT OF AGENT.

An agent must be appointed here by foreign executors, etc., as in case of administrators. See page 107.

## NOTICE OF APPOINTMENT.

Executors' notices of appointment,<sup>1</sup> and those of administrators with the will annexed, and the provisions of law concerning them, are the same as those of administrators, except of course that an executor is so called in his notice. Notices where agents are appointed to act for foreign administrators and executors are also the same, except that notices are not posted but published in a newspaper once a week for three successive weeks. See page 109.

Such a notice is not void because an executor calls himself therein "administrator."<sup>2</sup>

*Proof that the Notice Was Given.*

Affidavits of notices of appointment of executors and administrators with the will annexed, and the provisions of law concerning them,<sup>3</sup> are the same as those of administrators, except in the particular just mentioned.

## RESIGNATION AND REMOVAL OF EXECUTORS.

*Resignation.*

The matter of an executor's resignation, and that of an administrator with the will annexed, is the same as that of an administrator, except in his official name. See page 113.

<sup>1</sup> P. S., c. 132, § 1.

Mass. 401 (1867).

<sup>2</sup> *Finney v. Barnes et al., ex'rs*, 97

<sup>3</sup> P. S., c. 132, § 2.

*Removal.*

Executors may be removed for causes and to proceedings similar to those for the removal of administrators. See page 114.

Any one of several executors may be removed for sufficient cause, and the remaining executor allowed to execute the trust.<sup>1</sup>

## INVENTORY.

The proceedings in reference to appraising the estate of a testate are the same as though he had died intestate (see page 117), except when an executor, who is the residuary legatee, gives bond to pay the debts and legacies, he being then exempt from returning an inventory.<sup>2</sup>

## ALLOWANCE TO WIDOW AND CHILDREN.

In the estate of every deceased married man his widow and minor children are entitled to an allowance out of the personal property of the estate. The proceedings to recover the same from the estate of a testate are the same as in the estate of an intestate. See page 143.

## ASSIGNMENT OF DOWER, HOMESTEAD, ETC.

When a man dies testate, but makes no provision for his wife, she is entitled to dower, homestead, etc., at though he had died intestate. These are assigned to her as in intestate estates. This is also true if she waives the provisions of the will.

<sup>1</sup> *Winship v. Bass*, 12 Mass. 198 4 Pick. 97 (1826); *Jones v. Richardson*, 5 Met. 247 (1842); *Alger v. Col-*

<sup>2</sup> P. S., c. 129, § 6; *Stebbins v. Smith, well*, 5 Gray 67 (1855).

## WAIVER OF PROVISIONS OF WILL BY WIDOW.

At any time within six months after the probate of the will of her deceased husband, a widow may file in the registry of probate a writing signed by her, waiving any provisions the husband may have made for her in his will, or claiming such portion of his estate as she would have been entitled to if he had died intestate.<sup>1</sup> Such waiver and claim may be in the following form:—

To the Honorable the Judge of the Probate Court in and for  
the County of Essex:

Respectfully represents Ann Jones of Salem, in said county of Essex, that she is the widow of Thomas Jones, late of Salem, in said county of Essex, deceased, testate, that in and by the will of said deceased, which was proved in this court January 10, 1891, he made certain provisions for her in lieu of dower, that she now comes and waives any provisions made for her in said will, and that she claims such portion of said deceased's estate as she would have been entitled to if he had died intestate.

Ann Jones.

Salem, April 11, 1891.

When, after probate of such will, legal proceedings are instituted wherein its validity or effect is drawn in question, the probate court may, within said six months, on petition of the widow and after such notice as it may order, extend the time for filing the aforesaid claim and waiver till the expiration of six months from the termination of such legal proceedings.<sup>1</sup> The following is a petition for such extension of time:—

<sup>1</sup> P. S., c. 127, § 18. Her dower and other interests will then be as signed to her as though her husband had died intestate.



To the Honorable the Judge of the Probate Court in and for the County of Essex:—

Respectfully represents Ann Jones of Salem, in the county of Essex, that she is the widow of Thomas Jones, late of Salem, in said county of Essex, deceased, testate; that the will of said deceased was proved in this court January 10, 1891; that in and by the said will certain provisions were made for her in lieu of dower; that legal proceedings have been instituted wherein the validity or effect of said will are drawn in question; and she therefore prays that the time in which she may file her waiver of such provisions and claim of such portion of the estate of said deceased as she would have been entitled to if he had died intestate, be extended till the expiration of six months from the termination of such legal proceedings.

Ann Jones.

Salem, April 10, 1891.

Upon the application of any person interested, the probate court may appoint one or more trustees to hold during the life of the widow any personal estate to the income of which she may be entitled when the court assigns to her her interest in the estate of the deceased testate, in lieu of the provisions made for her in his will; and a trustee so appointed shall be subject to the provisions, so far as applicable, of P. S., c. 141.<sup>1</sup>

#### COLLECTION OF ASSETS, ETC.

The proceedings in reference to the collection of the assets of the estate of a testate are the same as though he had died intestate. See page 124.

#### *Debts Due from Heirs.*

A debt due from a legatee or devisee may be set off

<sup>1</sup> P. S., c. 127, § 19.

against his legacy or devise, or from an heir against his distributive share; and the probate court must hear the parties and determine the validity and amount of such debt, and may make all decrees and orders that are necessary or proper to carry such set-off or deduction into effect.<sup>1</sup> This set-off may, also, be made in an action at law.<sup>2</sup>

#### PAYMENT OF DEBTS.

The practice and the law in relation to the payment of debts, and proceedings to collect the same, are the same in testate as in intestate estates,<sup>3</sup> except when provision is expressly otherwise made in the will.

#### PERPETUAL CARE OF BURIAL LOTS.

Executors may pay for such purpose a sum of money fixed by the court.<sup>4</sup>

#### PAYMENT OF LEGACIES.

Legacies are generally payable after one year from the date of the approval of the executor's bond; but when requested the probate court may require that after the lapse of one year and within two years the legatee give a bond to the executor, with surety or sureties to be approved by the court, and conditioned to refund the amount so to be paid or so much thereof as may be necessary to satisfy any demands that may be afterwards recovered against the estate of the deceased, and to indemnify the executor against all loss and damage on account of such payment.<sup>5</sup>

<sup>1</sup> P. S., c. 136, § 22.

<sup>3</sup> See page 128.

<sup>2</sup> P. S., c. 136, § 23; *Blackler v. Boott et ali.*, 114 Mass. 24 (1873).

<sup>4</sup> St. 1897, c. 321. See page 186.

<sup>5</sup> P. S., c. 136, § 20.

Whenever by the provisions of a will a legacy is to be distributed in whole or in part among the heirs or next of kin of any person or persons, or to a class of persons, the probate court, on the application of any person interested, after such notice as it may order, may decree distribution to be made to such individual or individuals as, according to the will, seem to be entitled to the legacy, and such order of distribution protects the executor or administrator obeying the same as fully as an order of distribution in an intestate estate.<sup>1</sup>

Whenever the residence of a legatee is unknown,<sup>2</sup> or he is a minor, having no guardian,<sup>3</sup> the court may, on being satisfied of said facts, direct that the legacy be deposited or invested in the manner set forth in P. S., c. 144, § 16, and subject to the provisions thereof.

Specific legacies are accounted for by the executor at their appraised value.

With devises ordinarily the executor has nothing to do.

### *Succession or Collateral Tax.*

The procedure in the payment of this tax is the same in testate as in intestate estates, and applies to legacies as well as to distributive shares.<sup>4</sup>

### SALE OF PERSONAL PROPERTY.

The practice in relation to selling personal property of the estate is the same in testate as in intestate estates; except when a power of sale is contained in the will.<sup>5</sup>

<sup>1</sup> St. 1895, c. 134.

<sup>2</sup> St. 1885, c. 376.

<sup>3</sup> St. 1889, c. 185. See page 33.

<sup>4</sup> See page 187.

<sup>5</sup> See page 134.

## MORTGAGES, ETC., HELD BY DECEASED.

In the general sense there is no distinction between testate and intestate estates in relation to mortgages, etc., held by the deceased.<sup>1</sup>

## SPECIFIC PERFORMANCE.

When a person has become legally bound to make a conveyance of real estate, by an agreement in writing, and dies before the conveyance is made, the probate court may enforce a specific performance of such agreement, upon a petition therefor presented by any person interested in the conveyance. Notice of the petition must be given to all other persons interested to appear and show cause for or against the prayer of the petition; and the court may then order the executor to make the conveyance.<sup>2</sup>

## SALES DEPENDENT UPON CONSENT OF DECEASED PERSONS.

Where, under the provisions of a will, the sale of real estate by an executor is dependent upon the consent of a person who has deceased, the probate court having jurisdiction of the settlement of the estate may in its discretion, and if all parties interested assent, authorize the sale and conveyance of such real estate in like manner as though no such consent was required.<sup>3</sup>

## MORTGAGE OF REAL ESTATE.

Executors and administrators with the will annexed may be licensed by the probate court to mortgage the

<sup>1</sup> See page 136.

<sup>3</sup> P. S., c. 142, § 2.

<sup>2</sup> P. S., c. 142, § 1.

real estate of the deceased for the purpose of raising money to pay debts, legacies, or charges of administration, or for the purpose of paying an existing lien or mortgage on the estate. The probate court may also authorize an agreement for the extension or renewal of an existing mortgage.<sup>1</sup> The proceedings are the same as in intestate estates. Such mortgage may be made under power in will if the testator has given such authority.

#### SALE OF REAL ESTATE TO PAY DEBTS, ETC.

The procedure in the case of testate estates is the same as in intestate estates.<sup>2</sup> Such sale may be made under power in will if such authority is given by the testator.

If there is in the last will of the deceased any disposition of his estate for the payment of debts, or any provision which may require or induce the court to marshal the assets in a manner different from that which the law would otherwise prescribe, such devises or parts of the will must be set forth in the petition, and a copy of the will must be exhibited to the court, and the assets must be marshalled accordingly, so far as can be done consistently with the rights of the creditors.<sup>3</sup>

#### SALE OF PROPERTY BY FOREIGN EXECUTORS.

Foreign executors may, after setting up the will in any county in this commonwealth<sup>4</sup> where there is situated any real estate of the deceased, be licensed to sell real estate for the payment of debts, legacies, and

<sup>1</sup> P. S., c. 134, § 19; St. 1895, c. 140.

<sup>3</sup> P. S., c. 134, § 8.

<sup>2</sup> See page 175.

<sup>4</sup> See page 185.

charges of administration. The procedure is the same as in the case of foreign administrators.<sup>1</sup>

#### ACCOUNT.

Executors must render an account of their doings as administrators do (see page 190), crediting themselves with legacies paid.

An executor who is residuary legatee and gives bond to pay debts and legacies is not obliged to render an account to the court or any person.

Proceedings to force administrators and executors to render accounts are the same as in return of inventories.<sup>2</sup>

The accounts of deceased administrators and executors are rendered by their administrators or executors, and not by their successors.

An executor who, in his first account, erroneously charges himself with rents of real estate to which he was himself entitled as residuary devisee, is not estopped from showing the mistake and having it corrected.<sup>3</sup>

#### DISTRIBUTION OF UNBEQUEATHED ESTATE.

The process of distribution of an unbequeathed residue of an estate is the same as in an ordinary administration. See page 198.

#### INSOLVENCY.

If a testate estate is insolvent, it must be settled in the same manner as an intestate estate. See page 210.

<sup>1</sup> See page 185.

<sup>2</sup> See page 122.

<sup>3</sup> *Brown, ex'r, v. Baron*, 162 Mass. 56 (1894).



SETTLEMENT OF ESTATES OF PERSONS PRESUMABLY  
DEAD.

St. 1897, c. 447, applies to the allowance of wills of persons long absent and unheard of, as well as to general administration of their estates. The court may allow their wills and grant letters testamentary, upon the same notice as is given in case of deceased persons. The same rules and restrictions apply in the settlement of the estate as if death had been actually proven, except so far as they are modified by this statute. See page 224.

## CHAPTER IV.

### TRUSTS.

A married woman may be a trustee without any act or assent of her husband.<sup>1</sup>

### TRUSTS UNDER WILLS.

When a judge of probate acts under a will, as where a trustee is appointed in a will, which has been duly probated, he may appoint the trustee, upon his formal petition, without notice to any one; otherwise, notice must be given.<sup>2</sup>

### DECLINATION OF TRUSTEE.

A trustee may decline to serve, by a written declination filed in the probate court. For form of such declination see page 232.

### FORMAL APPOINTMENT OF TRUSTEE.

The petition for the appointment of a trustee under a will is in the following form :—

To the Honorable the Judge of the Probate Court in and for the County of *Essex* :

Respectfully represents *James Smith* of *Salem*, in the county of *Essex*, that *Thomas Smith*, late of *Salem*, in said county of *Essex*, merchant, deceased, testate, by his last will and testament,

<sup>1</sup> P. S., c. 147, § 5. As to competency of a trustee, see *Gaskill v. Green et al.*, 152 Mass. 526 (1890).  
<sup>2</sup> *Shaw v. Paine*, 12 Allen 293 (1866).

duly proved and allowed on the *second* day of *May*, A. D. 1892, in said court, did therein give certain estate in trust for the use and benefit of *Samuel A. Nelson of said Salem*, and appointed *the petitioner* [or, *William Long*] trustee thereof [or, *and that said William Long has since deceased*; or, *declines to accept said trust*; etc.]; and that he is willing to accept said trust, and give bond according to law, for the faithful discharge thereof: he therefore prays that he may be appointed trustee as aforesaid, according to the provisions of the law in such case made and provided.

Dated this *tenth* day of *August*, A. D. 1892.

*James Smith.*

If the petitioner was not appointed in the will then the beneficiary and remainder men must either assent, by signing the following form of assent, or be cited into court:—

The undersigned, being all the persons interested, hereby assent to the foregoing petition.

The citation ordered by the court must be served by publishing the same once in each week, for three successive weeks, in a newspaper named therein, the last publication to be one day, at least, before the return day therein named.

The return on the citation must be made in the customary form, under oath.

The executor or administrator of a former trustee is not required to succeed the deceased trustee in the trust.<sup>1</sup>

If a testator omits to appoint a trustee in his will, and an appointment is necessary to carry the will

<sup>1</sup> P. S., c. 141, § 11.

into effect, the probate court may, after notice to all persons interested, appoint a trustee.<sup>1</sup>

The court may also appoint one in place of a trustee, under a written instrument, who declines, resigns, dies, or is removed before the objects of the trust are accomplished, and when no adequate provision is made in such instrument for supplying the vacancy, after notice to all persons interested, to act alone or jointly with others.<sup>2</sup>

When lands in this commonwealth are held in trust for persons resident here by a trustee who derives his appointment or authority from a court having no jurisdiction within this commonwealth, such trustee must, on petition made to the probate court for the county in which the lands lie, and after due notice, be required to take out letters of trust from said court; and upon his neglect or refusal to comply with such order, the court must declare such trust vacant, and appoint a new trustee.<sup>3</sup> The notice to the trustee may be given by serving on him a copy of the petition, and of the citation of the court issued thereon, fourteen days at least before the time fixed for the return of such citation, or by such other notice as the court may order.<sup>4</sup>

If the testator releases the trustee from giving a bond with sureties, the petition for appointment is in the following form :—

To the Honorable the Judge of the Probate Court in and for  
the County of *Essex* :

Respectfully represents *James Smith*, of *Salem*, in the county of *Essex*, that *Thomas Smith*, late of *Salem*, in said county of

<sup>1</sup> P. S., c. 141, § 4.

<sup>3</sup> P. S., c. 141, § 7.

<sup>2</sup> P. S., c. 141, § 5.

<sup>4</sup> P. S., c. 141, § 8.

*Essex, merchant*, deceased, testate, by his last will and testament, proved and allowed on the *second* day of *May*, A. D. 1892, in said Court, did therein give certain estate in trust for the use and benefit of *Samuel A. Nelson of said Salem*, and appointed the petitioner trustee thereof, and in and by said will requested that said *petitioner* be exempted from giving a surety on his bond as such trustee, that he is willing to accept said trust and give bond according to law for the faithful discharge thereof; he therefore prays that he may be appointed trustee as aforesaid, and that he may be exempt from giving a surety on his bond, according to the provisions of the law in such case made and provided.

Dated this *tenth* day of *August*, A. D. 1892.

*James Smith.*

On this petition neither notice nor assent are required.<sup>1</sup>

#### BOND.

Trustees must give bond,<sup>2</sup> either with or without sureties, in the same form as those of administrators, except the condition, which, in a trustee's bond, is as follows:—<sup>3</sup>

The condition of this obligation is such that if the above-bounden *James Smith*, trustee of certain estate given in trust for the benefit of *Samuel A. Nelson, of said Salem*, under the will of *Thomas Smith* [or, a certain instrument (Describing it)], late of *Salem*, in said county of *Essex, merchant*, deceased, testate, shall:—

<sup>1</sup> Where a testator directs that the judge of probate shall approve of

the appointment of a trustee made by other persons, no notice is required, as he does not then act officially, but under the will. *National Webster Bank v. Eldridge*, 115 Mass.

424 (1874).

<sup>2</sup> P. S., c. 141, §§ 6, 12, 13. Trustees for charitable trusts need not give bonds. *Drury v. Natick*, 10 Allen 169 (1865).

<sup>3</sup> P. S., c. 141, §§ 12, 13.

First, make and return to said Probate Court, at such time as it may order, a true inventory of all the real and personal estate belonging to *him* as such trustee, which at the time of the making of such inventory shall have come to *his* possession or knowledge.<sup>1</sup>

Second, manage and dispose of all such estate, and faithfully discharge *his* trust in relation thereto, according to law and to the will of said testator;

Third, render upon oath, at least once a year, until *his* trust is fulfilled, unless he is excused therefrom in any year by said Court, a true account of the property in *his* hands, and of the management and disposition thereof, and also render such account at such other times as said Court may order;

Fourth, at the expiration of *his* trust, settle *his* account in said Court, and pay over and deliver all the estate remaining in *his* hands, or due from *him* on such settlement, to the person or persons entitled thereto;

Then this obligation to be void, otherwise to remain in full force and virtue.

In a bond required of a trustee who succeeds another, and an inventory is not required, the first paragraph of the condition of the bond may be erased.<sup>2</sup>

A trustee under a will is exempt from giving a surety or sureties on his bond when the testator has ordered or requested such exemption, or that no bond should be required, and any trustee is also exempt when all the persons beneficially interested in the trust, who are of full age and legal capacity, other than creditors, request such exemption; but not until the guardian of any minor interested therein and such other persons

<sup>1</sup> If an inventory is not required, and page 263.  
cross out this paragraph. See below <sup>2</sup> P. S., c. 141, § 14.



as the court directs, have been notified and had opportunity to show cause against the same; but a trustee must, in every case, give a bond either with or without sureties.<sup>1</sup>

The court may, at any time, when it deems it proper, require a trustee to give a bond with sureties.<sup>2</sup>

If a trustee neglects to give bond he will be considered as having declined or resigned his trust.<sup>3</sup>

All the provisions of law generally applicable to administrators' bonds, and to proceedings thereon, also apply to bonds of trustees.

#### APPOINTMENT OF AGENT.

Every trustee, appointed by a probate court residing out of the commonwealth, before entering upon the duties of his trust, must appoint in writing an agent residing in the commonwealth, and by such writing must stipulate and agree that the service of any legal process against him as such trustee, if made on such agent, shall be of the same legal effect, as if made on himself personally within the commonwealth. Such writing must give the proper address of such agent and be filed in the office of the register of the probate court which appointed him. Every trustee removing from and residing out of the commonwealth, having been appointed by a probate court within the commonwealth, must in writing appoint a like agent with like stipulations, and cause such writing to be filed as above. If an agent thus appointed dies or removes from the commonwealth before the final settlement of the accounts of his principal another like appointment

<sup>1</sup> P. S., c. 141, § 16, amended by St. 1891, c. 339.

<sup>2</sup> P. S., c. 141, § 17.

<sup>3</sup> P. S., c. 141, § 18.

must be so made and filed. P. S., c. 132, §§ 11, 12, 13, apply to such trustees and agents.<sup>1</sup>

For form of appointment of agent, see page 108.

#### RESIGNATION AND REMOVAL OF TRUSTEES.

Trustees may resign or be removed as administrators may.<sup>2</sup> Such removal may be made on petition of parties beneficially interested, if it appears essential to their interests.<sup>3</sup> All proceedings relating to resignation and removal of administrators apply to trustees.<sup>4</sup>

#### INVENTORY.

After his appointment a trustee must return an inventory of the trust estate as soon as the estate is made certain or comes to his possession, in a manner similar to that of administrators.<sup>5</sup>

When a trustee is appointed to succeed another the court may dispense with the return of an inventory if it appears to be unnecessary.<sup>6</sup>

#### CHANGE OF TRUST.

When all living parties who are interested as beneficiaries in a trust created by will proved and allowed in this state reside without the commonwealth, the probate court having jurisdiction of the trust may, on application of the parties in interest, or of the executor, administrator, or trustee, and if it deems it just and expedient, authorize the executor, administrator or trustee to pay over the fund to a trustee appointed by the proper court in any other state or

<sup>1</sup> St. 1889, c. 462.

<sup>2</sup> P. S., c. 141, §§ 9, 10.

<sup>3</sup> P. S., c. 141, § 9.

<sup>4</sup> See page 113.

<sup>5</sup> P. S., c. 141, § 15. See page 117.

<sup>6</sup> P. S., c. 141, § 14.

country, provided all the *certuis que trust* who are living, and the executor, administrator, or trustee, signify their consent, and the court is satisfied that the laws of such other state or country secure the due performance of the trust; and upon such payment, shown to the satisfaction of said probate court, the executor, administrator, or trustee appointed here may be discharged from further responsibility by decree of said court.<sup>1</sup>

Where there are contingent interests in such trust fund, whether the persons who may be entitled thereto are in being or not, and where any of the *certuis que trust* are minors, the court, before making an order or decree in the premises, must cause such interests and minors to be properly represented by guardians *ad litem* or otherwise at its discretion.<sup>2</sup>

#### GENERAL DUTIES OF TRUSTEES.

Trustees must immediately upon their receipt invest the funds, and reinvest and change the securities and investments as is most advantageous to the estate, and carry out the wishes of the testator as expressed in the will.

The probate court may hear and determine in equity all matters in relation to trusts created by will or other written instrument, and has jurisdiction over all matters relating to the termination of trusts under wills, deeds, indentures, or other instruments.<sup>3</sup> All such matters of trust, except those arising under wills, are within the jurisdiction of the court for the county in which any of the parties interested in the trust re-

<sup>1</sup> P. S., c. 144, § 17.

<sup>3</sup> St. 1892, c. 116.

<sup>2</sup> P. S., c. 144, § 18.

side, or in which any of the land held in trust is situated; and such jurisdiction, when once assumed, excludes every other probate court from taking jurisdiction of any matter subsequently arising in relation to the same trust.<sup>1</sup>

#### SALES OF REAL ESTATE.

Trustees may be given sufficient power and authority in the will to sell and convey the real estate of the trust, and if so they may do so without authority from court. The deed in such case is in the following form:—

Know all men by these presents that, I, *James Smith of Salem*, in the Commonwealth of Massachusetts, trustee under the last will of *Thomas Smith*, late of *Salem*, in the County of *Essex* and Commonwealth aforesaid, deceased, which will was duly proved and allowed by the Probate Court for said County on *January 29, 1892*, do by virtue and in execution of the power to me given in and by said will, and of every other power and authority me hereto enabling, and in consideration of the sum of *eight hundred* dollars to me paid by *Thomas Andrews of said Salem*, the receipt whereof is hereby acknowledged, hereby grant, bargain, sell, and convey unto the said *Thomas Andrews and his heirs and assigns a certain lot of land situate in said Salem, together with the buildings thereon, and bounded on the north by Essex street forty-nine (49) feet, on the east by land of Moses Ingalls seventy-six (76) feet, on the south by land of Nathan Isaacs thirty-eight (38) feet, and on the west by land of Martin Millett eighty (80) feet*. To have and to hold the above-granted premises, with all the privileges and appurtenances thereto belonging, to the said *Thomas Andrews and his heirs and assigns*, to their own use and behoof forever. In witness whereof I, the said

<sup>1</sup> P. S., c. 141, § 28.

*James Smith*, hereto set *my* hand and seal, this *second* day of *November*, in the year one thousand eight hundred and ninety-three.

Signed and sealed in presence of

*Isaac Mansfield,*  
*Addison Plaisted.*

*James Smith* [SEAL],  
*Trustee.*

#### COMMONWEALTH OF MASSACHUSETTS.

*Essex*, ss. Nov. 2, 1893. Then personally appeared the above named *James Smith*, trustee, and acknowledged the foregoing instrument to be *his* free act and deed.

Before me, *Amos Amsden*, Justice of the Peace.

If trustees have, in the instrument under which they are appointed, no authority to sell and convey the real estate, if any, belonging to the trust estate, and it is necessary or expedient to make the sale, they can apply to the probate court under authority of which they are acting for power to do so.<sup>1</sup> The petition for this purpose is in the following form. If, for any reason, trustees desire authority from the court for the transfer of personal property, they can use this form for that purpose, also.

To the Honorable the Judge of the Probate Court in and for the County of *Essex*:

Respectfully represents *James Smith*, trustee under the will of *Thomas Smith*, late of *Salem*, in the county of *Essex*, merchant, deceased, testate, for the benefit of the persons below named, that he holds as such trustee certain *real* [or, *personal*] estate, to wit: *A certain lot of land, situate in said Salem, bounded on the north by Essex street, on the east by land of George Ames, on the south by land of Thomas Carter, and on the west by Ober street* [or, *a certain certificate of stock in the Colorado*

<sup>1</sup> P. S., c. 141, § 20.

*Mining Company, numbered 11,400, for 125 shares*], that the sale, conveyance and transfer of said estate is necessary and expedient, for the reason that *it yields no income* [or, *insufficient income*; etc.]; that an offer of *eight hundred* dollars has been made for it, which is its full value; that it is desirable that the proceeds thereof be invested and applied in the following manner: [Here state the manner and kind of investment.]

After diligent search the following are found to be the only persons known to the petitioner who are or may become interested therein:

Name.	Residence.	Nature of Interest.
<i>Samuel A. Nelson,</i>	<i>Salem, Mass.,</i>	<i>Beneficiary for life.</i>
<i>John Smith,</i>	“ “	<i>Remainder-man.</i>

[If any of the persons in interest are minors or insane persons, the fact should be stated in this place.]

That the only persons now ascertained whose issue, not now in being, may become interested are:

Name.	Residence.
<i>George A. Mighill,</i>	<i>Rowley, Mass.</i>
<i>William Armstrong,</i>	<i>Newbury, Mass.</i>

Wherefore your petitioner prays that he may be authorized to make said sale, conveyance and transfer, at private sale or at public auction, and to make the said investment and application of the proceeds thereof.

Dated this *tenth* day of *November*, A. D. 1894.

*James Smith.*

The parties in interest can assent to this petition in the ordinary way, but if they do not they must be notified by delivering a copy of the citation issued by the register of probate upon the petition to each person interested in the estate fourteen days at least before the return day named therein, or by publishing the same once in each week, for three successive weeks,



in a newspaper named therein, the last publication to be one day at least before the return day.

The return on this citation must show the manner in which notice was given, and be under oath.

A person must be appointed next friend of all persons not ascertained, or not in being, who are or may become interested, and also some one appointed guardian *ad litem* of any interested minor or insane person.<sup>1</sup> If that has been done, and the court finds that the sale, conveyance and transfer are necessary, expedient, and most for the interest of all concerned in the trust, it will decree that the trustee be authorized to make the sale, conveyance and transfer of the estate at any time within one year, either at private sale for the sum named in the petition, or for a larger sum, or at public auction, and to invest and apply the proceeds of the sale according to law and the terms of the trust instrument.

If the trust estate is held in trust for, or a remainder or contingent interest therein is limited over to, persons not ascertained or not in being, notice of a petition for the sale of such trust estate must be given in such manner as the court orders, to all persons who are or may become interested in such estate, and to all persons whose issue, not then in being, may become so interested; and in every such case the court must appoint a suitable person to appear and act therein as the next friend of all persons not ascertained or not in being, who are or may become inter-

<sup>1</sup> If a minor or insane person has a legal guardian who is not interested in the matter in issue, such guardian should look after his ward's interest, and no guardian *ad litem* should be appointed. *Mansur v. Pratt*, 101 Mass. 60 (1869).

ested in such estate. The cost of the appearance of such person, and the compensation of his counsel, determined by the court, must be paid, as the court may order, either out of the trust estate or by the petitioner; in which latter case execution may issue therefor in the name of the next friend.<sup>1</sup>

When a person seized or possessed of real or personal estate, or of an interest therein, upon a trust, express or implied, is under the age of twenty-one years, insane, out of the commonwealth, or not amenable to the process of any court therein which has equity powers, and when in the opinion of the court it is fit that a sale should be made of such estate or of an interest therein, or that a conveyance or transfer should be made thereof in order to carry into effect the objects of the trust, the probate court may by decree direct such sale, conveyance, or transfer to be made, and may appoint some suitable person in the place of such trustee to sell, convey or transfer the same in such manner as it requires. If a person so seized or possessed of an estate, or entitled thereto upon a trust, is within the jurisdiction of the court, he or his guardian may be ordered to make such conveyance as the court may deem proper.<sup>2</sup>

All the provisions on page 184 apply to sales by trustees. The provisions of the last paragraph on page 185, and first on page 186, apply to sales by foreign trustees.

#### MORTGAGE OF TRUST ESTATE.

If for any reason it is for the benefit of a trust estate to mortgage real estate belonging thereto, the trustee

<sup>1</sup> P. S., c. 141, § 21.

<sup>2</sup> P. S., c. 141, § 22.

may apply to the probate court for authority therefor, where none is given in the will or other instrument creating the trust. The estate may be mortgaged for the purpose of paying sums assessed on the trust estate for betterments or the expense of repairs and improvements made necessary on the estate by such betterments, or by the lawful taking of such estate or of a part thereof by a city or town, for the purpose of paying the expense of erecting, altering, completing, repairing or improving a building on such estate or for the purpose of paying the expense of other improvements of a permanent nature made or to be made upon such estate; or for the purpose of paying an existing lien or mortgage on such trust estate or on a part thereof.<sup>1</sup>

If the trust was created by will, the petition must be brought in the county where the trustee was appointed; otherwise in the county in which the estate or some part of it is situated.<sup>2</sup>

The petition for this purpose is in the following form :—

To the Honorable the Judge of the Probate Court in and for the County of *Essex* :

Respectfully represents *James Smith*, trustee under the will of *Thomas Smith*, late of *Salem*, in said county of *Essex*, merchant, deceased [or, (Describe the instrument)]; that it will be for the benefit of the trust estate held by him as such trustee that certain of said trust estate, to wit: [Describe the real estate by metes and bounds], be mortgaged to raise the sum of *one thousand* dollars, for the purpose of *repairing the buildings thereon*, and that the following-named persons only are inter-

<sup>1</sup> P. S., c. 141, § 23, amended by St. 1889, c. 66.      <sup>2</sup> P. S., c. 141, § 24.

ested in said estate, namely: *John Andrews, Peter Sanders, and Henry Ambrose, all of said Salem.*

Wherefore said trustee prays that he may be authorized to mortgage said real estate to the amount aforesaid for the purposes aforesaid, agreeably to the law in such case made and provided.

Dated this *second* day of *August*, A. D. 1895.

*James Smith.*

Parties in interest may assent to the petition in the ordinary manner, but if they do not they must be notified by publishing the citation issued on the petition once in each week, for three successive weeks, in a newspaper named in the citation, the last publication to be one day at least before the return day stated therein, and to send, or cause to be sent, a written or printed copy of the citation, properly mailed, postage prepaid, to each of the persons interested in the trust estate, or their legal representatives, known to the petitioner, seven days at least before the return day.

The return on the citation must be sworn to, in the ordinary manner.

It will be decreed that the trustee be authorized to give the mortgage to raise a certain named sum at any time within one year from the date of the decree, by a deed with or without a power of sale clause, for a term not exceeding a certain number of years named, at a rate of interest not exceeding a certain named per cent. per annum, payable semi-annually, and that some portion of the principal be paid annually out of the income of the estate.<sup>1</sup>

<sup>1</sup> P. S., c. 141, § 24, which see.

## EXTENSION AND RENEWAL OF MORTGAGE.

The probate court may authorize trustees to make an agreement to extend or renew a mortgage.<sup>1</sup> In such a case, follow directions on page 172 when framing a petition therefor.

## ACCOUNT.

A trustee must account annually, at least, to the probate court that appointed him.

The account is in form similar to that of administrators and executors, except that trustees' accounts must state separately the receipts of income and principal; and payments and changes on account of such income and principal must also be separately stated.<sup>2</sup> If the trustee makes an error in thus stating his account, it can be opened by leave of court.<sup>3</sup>

Former accounts may be reopened on the rendering of a further account by a trustee or a surviving trustee, or by a successor appointed in place of a deceased trustee.<sup>4</sup>

The account of a trustee is to be rendered in the following form:—

The *first* [or, *second*; etc.] account of *James Smith*, trustee under the will of *Thomas Smith*, late of *Salem*, in the county of *Essex*, merchant, deceased, for the benefit of *Samuel A. Nelson*.

This account is for the period beginning with the *first* day of *November*, A. D. 1894, and ending with the *thirty-first* day of *October*, A. D. 1895.

<sup>1</sup> P. S., c. 141, § 23, amended by St. 144 Mass. 461 (1887). 1889, c. 66.

<sup>4</sup> *Blake v. Pegram*, 110 Mass. 592

<sup>2</sup> St. 1895, c. 210.

(1869).

<sup>3</sup> *Doddet al., tr's, v. Winship, g'd'n*,

Said accountant charges <i>himself</i> with the several amounts received, on account of principal, as stated in Schedule A, herewith exhibited.....	\$4,750.50
And asks to be allowed for sundry payments and charges, on account of principal, as stated in Schedule B, herewith exhibited.....	<u>1,350.00</u>
Balance of principal invested, as stated in Schedule C, herewith exhibited.....	\$3,400.50
He also charges <i>himself</i> with the several amounts received on account of income, as stated in Schedule D, herewith exhibited.....	200.00
And asks to be allowed for sundry payments and charges on account of income, as stated in Schedule E, herewith exhibited.....	<u>185.00</u>
Balance of income.....	\$ 15.00
<i>James Smith, Trustee.</i>	

## SCHEDULE A.

In this schedule must be placed every transaction that increases the trust funds.

1892.

(1) Nov. 1. Amount of personal property, according to inventory, <sup>1</sup> .....	\$2,950.75
(2) Nov. 1. Balance of principal, according to next prior account, <sup>2</sup> .....	2,875.10
Amounts received on account of principal, as follows:	
(3) Dec. 10. By sale of certificate of stock in Colorado Mining Company, No. 1019, seventy shares, net proceeds of sale, \$1,100; inventory value, \$1000; gain.....	<u>100.00</u>
	\$5,925.85

<sup>1</sup> If this is not the first account of the trustee, cross out this line.

<sup>2</sup> If this is the first account of the trustee, cross out this line.



## SCHEDULE B.

In this schedule must be placed every transaction that has reduced the trust funds.

Amounts paid out and charges on account of principal, as follows:

1894.

- (1) *Nov. 20. To sale of certificate of stock in Colorado Mining Company, No. 1,217, forty-seven shares, net proceeds of sale, \$1,478; inventory value [or, cost] \$1500; loss.....\$22.00*

## SCHEDULE C.

This schedule must be a list of all the trust funds at the time of rendering the account.

- (1) *150 shares of stock in Naumkeag Pump Co., certificate No. 179.....\$2,015.00*  
 (2) *House and lot, Salem street, Lynn..... 1,900.00*  
 (3) *Deposit in Danvers Savings Bank, book No. 976... 800.00*  
\$4,715.00

## SCHEDULE D.

This schedule must make acknowledgment in detail of all income received from the trust funds.

1894.

- (1) *Nov. 1. Balance of income, according to next prior account<sup>1</sup>..... \$35.25*  
 Amounts received on account of income,  
 as follows:

- (2) *Nov. 20. By interest on deposit in Danvers Savings Bank, book No. 1698, to Oct. 19, 1894.. 137.50*

1895.

- (3) *Mch. 2. By rent received of James Brown, for house in Lynn..... 75.50*  
\$248.25

<sup>1</sup> If this is the first account of the trustee, cross out this line.

### SCHEDULE E.

This schedule should contain in detail a statement of all payments made from the income derived from the trust funds.

Amounts paid out and charges on account of income, as follows:

1894.

(1) Dec. 30. To Samuel A. Nelson, the beneficiary.....\$125.00

1895.

(2) *May 20. To repairing house in Lynn . . . . . 19.50*

(3) Sept. 25. To taxes, Lynn.....	20.00
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(4)	Oct. 30.	To services as trustee <sup>1</sup> .....	20.50
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\$185.00

When property is held in trust under a written instrument or statute, and there is no adequate provision for an account of the management of the trust estate, the probate court for the county where land so held is situate, or where a person interested in such trust resides, may, on application of any person interested, require the trustee to render an account on oath to said court; and the court first so applied to has thereafter exclusive original jurisdiction therein.<sup>2</sup>

SALE OF STANDING WOOD AND TIMBER DURING LIFE  
ESTATE, ETC.

When it appears that wood and timber, standing on land the use and improvement of which belongs,

<sup>1</sup> Trustees should be allowed a reasonable compensation for their services. *Barrell v. Joy*, 16 Mass. 221 (1819); *Longley v. Hall*, 11 Pick. 124 (1831); *Uran v. Coates*, 117 Mass. 41 (1875). A person who is both trustee and guardian is not entitled to full compensation in each capacity for the same service. *Blake v. Pegram*, 101 Mass. 592 (1869). The amount of compensation he shall receive, is not invalid, if the *certui que trust* is *sui juris* and competent to act, and no fraud is practised or undue advantage taken; and such agreement should be taken into consideration by the probate court in determining the amount the trustee is entitled to charge. *Bowker v. Pierce*, 130 Mass. 262 (1881).

An agreement made by a trustee with his *cestui que trust*, in regard to

<sup>2</sup> P. S., c. 144, § 15.

for life or otherwise, to a person other than the owner of the fee therein, has ceased to improve by growth, or ought for any cause to be cut, the probate court for the county in which the land lies may appoint a trustee and authorize and empower him to sell and convey said wood and timber, to be cut and carried away within a time to be limited in the order of sale, and to hold and invest the proceeds thereof, after paying therefrom the expenses of such sale, and to pay over the income, above the taxes and other expenses of the trust, to the person entitled to such use and improvement while his right thereto continues, and, at the expiration of such right, to pay the principal sum to the owner of such land. When wood and timber has been cut as aforesaid, no more can be cut on such land by the person entitled to such use and improvement without permission from said court. The sale is made in the manner provided by law for the sale of real estate by guardians. The court may from time to time remove the trustee, and appoint another in his stead.<sup>1</sup>

#### SALE AND MORTGAGE OF LAND SUBJECT TO CONTINGENT REMAINDERS.

When real estate is held subject to a contingent remainder, executory devise, or power of appointment, the probate court for the county in which such real estate is situated, may upon the petition of any person who has an estate in possession in such real estate, appoint one or more trustees, and authorize him or them to sell and convey such estate or any

<sup>1</sup> P. S., c. 126, § 12.

part thereof in fee simple, if such sale and conveyance appears to the court to be necessary and expedient; or to mortgage the same, either with or without a power of sale, for such an amount, on such terms, and for such purposes as may seem to the court judicious or expedient.<sup>1</sup> The petition is in the following form:—

To the Honorable the Judge of the Probate Court in and for the County of Essex:

Respectfully represents John Smith of Salem, in said county of Essex, that he has a life estate in possession in the following described real estate, viz.: a certain lot of land situate in said Salem [Describe the premises by metes and bounds]; that William Coffin of said Salem is entitled to the remainder in said real estate contingent upon his surviving your petitioner, otherwise it is to descend to James Jones of Beverly, in said county of Essex, in fee simple; that the said life estate and contingent remainders were created in and by the last will of Thomas Smith, late of said Salem, deceased, which will was duly proved and allowed by this court April 22, 1894; and that it is necessary and expedient to sell and convey the same in fee simple.

Your petitioner therefore prays that one or more trustees may be appointed and authorized to sell and convey said real estate, and to hold the proceeds of such sale for the benefit of the said parties in interest until said contingent remainders shall be determined.

Dated this seventh day of March, A. D. 1896.

John Smith.

Parties interested or who may become interested in the real estate, and those persons whose issue not in being may become interested therein, may assent to

<sup>1</sup> P. S., c. 120, § 19.

the petition, but if they do not notice must be given to them in such manner as the court may order.<sup>1</sup>

The court must appoint a suitable person to appear and act in the case as the next friend of all minors, persons not ascertained, and persons not in being, who are or may become interested in the real estate. The cost of the appearance and services of such next friend, including the compensation of his counsel, to be determined by the court, must be paid, as the court may order, either out of the proceeds of the sale or mortgage, or by the petitioner, in which latter case execution therefor may issue in the name of the next friend.<sup>1</sup>

Such trustees must give bond in such form and amount as the court may order. They hold the proceeds of such sale or mortgage for the benefit of the same parties as if the sale or mortgage had not been made.<sup>2</sup>

Jurisdiction in all matters concerning such a trust is given to the probate court.<sup>2</sup>

In case of a mortgage instead of a sale the form of the petition should be changed accordingly.

If the land is ordered to be sold by trustees appointed for that purpose, the decree will be that it appears to be necessary and expedient to sell the described real estate, and that one or more persons named therein are appointed trustees to make the sale and to hold the proceeds thereof in trust for the benefit of certain parties named therein, the said trustee or trustees giving bond with sufficient sure-

<sup>1</sup> P. S., c. 120, § 20.

<sup>2</sup> P. S., c. 120, § 21.

ties to the satisfaction of the court for the due performance of the trust. If the decree is to mortgage the real estate it should fix the amount, the time of payment of principal and interest, and the rate of interest.

#### TRUSTS FOR CREDITORS.

If a person made a conveyance of real estate in this commonwealth in trust for the benefit of his creditors, and the trustee has satisfied all known creditors other than himself, and the grantor dies, the court that has granted administration on the estate of the deceased may, upon the petition of the trustee, representing the facts and praying that he might settle his account in said court and to have the trust terminated, appoint a time and place for hearing all persons interested in such trust, notice of which hearing must be given by advertisement in some newspaper published in the county, or otherwise, as the court may order. Upon such hearing the court may terminate the trust, so far as the creditors and persons claiming under them are concerned; may discharge such real estate from the trust, and may settle the trust account, and make any further order as to the disposition, distribution, or partition of the remaining trust estate, which is not inconsistent with the provisions of the original instrument creating the trust.<sup>1</sup> The trust instrument must bear date not more than six years previous to the time appointed for the hearing; and the insolvent laws of the state are not affected.<sup>2</sup>

<sup>1</sup> P. S., c. 141, § 25.

<sup>2</sup> P. S., c. 141, § 26.



## CHAPTER V.

### GUARDIANSHIP.

Guardians are appointed by the probate court, when it appears to be necessary or convenient, upon the petition of some person, over minors and others resident in the county, or resident without the commonwealth, but who have estate in the county.<sup>1</sup> Married women may be guardians without any act or assent of their husbands.<sup>2</sup>

#### OF MINORS.<sup>3</sup>

Testamentary guardians can only be appointed by wills duly executed.<sup>4</sup> See P. S., c. 139, § 5.

The petition for the appointment of a guardian of a minor, in the ordinary case, is as follows :—

To the Honorable the Judge of the Probate Court in and for  
the County of *Essex* :

Respectfully represents *John Smith* of *Salem*, in the county of *Essex*, that there is occasion for the appointment of a guardian of

<i>Lewis A. Mason,</i>	born <i>Feb. 29, 1878,</i>
<i>Georgia E. Mason,</i>	“ <i>Oct. 30, 1880,</i>
<i>Anna W. Mason,</i>	“ <i>May 1, 1882,</i>

<sup>1</sup> P. S., c. 139, § 1.

<sup>2</sup> P. S., c. 147, § 5.

<sup>3</sup> The expressed wish of a deceased parent as to the guardianship of his child is entitled to great regard, but

is not conclusive upon the court. *Wardwell v. Wardwell*, 9 Allen 518 (1864).

<sup>4</sup> *Wardwell v. Wardwell*, 9 Allen 518 (1864).

*all of Salem, in the county of Essex, minors and children of William Mason, late of Salem, in the county of Essex, deceased and Ann Mason, his widow [or, Ann Mason, late of Salem, in the county of Essex, deceased, and William Mason, her husband]; and your petitioner prays that he, or some other suitable person, may be appointed to that trust.*

Dated this *eleventh* day of *May*, A. D. 1895.

*John Smith.*

The court may nominate guardians for minors under fourteen years old, but any minor above that age can nominate (subject to the approval of the court) his guardian<sup>1</sup> before a justice of the peace, or in open court.<sup>2</sup> This is usually done before a justice of the peace, and a certificate thereof, in the following form, must then be filed with the petition:—

*Essex, ss. May 12, A. D. 1895. Personally appeared the above-named Lewis A. Mason and Georgia E. Mason, minors, above the age of fourteen years, and nominated said John Smith to be their guardian.*

Before me, *Robert Andrews*, Justice of the Peace.

The Boston Children's Friend Society<sup>3</sup> and The Association for the Protection of Destitute Roman Catholic Children in Boston<sup>4</sup> may be appointed guardians of minors.

If both or either of the parents of the minors are living, they must either assent to the appointment of the guardian, or be cited into court. This assent may be given by signing the following form:—

I, the surviving parent [or, *parents*] of said minor [or, *-s*], hereby assent to the granting of the foregoing petition.

*Ann Mason.*

<sup>1</sup> P. S., c. 139, § 2.

<sup>3</sup> St. 1885, c. 362.

<sup>2</sup> P. S., c. 139, § 3.

<sup>4</sup> St. 1890, c. 117.

If the husband<sup>1</sup> and parent or parents of the minor do not assent in writing, or there are no parents known to be living, they, or the next of kin, must be notified to come into court and object. Notice is to be given to the husband, if any, in such way as the court may order,<sup>1</sup> and to other parties in interest, by publishing a citation issued by the register, once in each week, for three successive weeks, in a newspaper named therein, the last publication to be one day at least before the return day named therein, or by delivering a copy thereof to the parent or parents, if living, at least seven days before the return day.

The return on this citation must indicate in which mode the citation was served, and be sworn to.

The guardian of a minor has no control over the custody and education of his ward, if the minor's father or mother is living and competent to transact their own business; but the probate court may order that the guardian have such custody, if, upon a hearing and after such notice to the parents, or surviving parent, as it may direct, it finds such parent or parents unfit to have such custody, or if it finds one of them unfit therefor, and the other files in court his or her consent in writing to such order.<sup>2</sup>

The probate court may, upon the application of a guardian entitled to the custody of his minor ward, during the lifetime of both or either of the parents of such ward, and after notice to all parties interested, order and require such parents, or either of them, to contribute to the support and maintenance of such minor in such sums and at such times as, having re-

<sup>1</sup> P. S., c. 139, § 13.

<sup>2</sup> P. S., c. 139, § 4.

gard to all the circumstances of the case, may seem just and reasonable. The court may from time to time afterward, on application made by either party above named, revise or alter such order, or make such new order or decree as the circumstances of the parties or the benefit of the minor may require. The parties so charged with the contribution for support may be ordered to furnish a bond, payable to the judge and his successor, in such sum and with such sureties as the court may order.<sup>1</sup>

Public notice of the appointment is not necessary.<sup>2</sup>

#### OF INSANE PERSONS.

The guardianship of an insane person is also begun by the petition of two or more of the relatives or friends of the insane person, or by the petition of the selectmen of the town, or mayor and aldermen of the city, of which he is an inhabitant or resident, or upon which he is or may become chargeable for support.<sup>3</sup> The petition is in the following form:—

To the Honorable the Judge of the Probate Court in and for the County of *Essex*:

Respectfully represent *John Smith and Thomas Smith, both of Salem, in the county of Essex, sons [or, friends] of the herein-after named Thomas Smith [or, Robert Jones, mayor, and Julius Amboy, Moses Burnham, Horace Larcom, and William Lovett, aldermen, of Salem, in said county of Essex]*, that *Thomas Smith, an inhabitant or resident of Salem, in said county of Essex, is an insane person, and incapable of taking care of himself. Your petitioner therefore prays that Edward Nudd of Salem, in said county of Essex, or some other suitable person, may be ap-*

<sup>1</sup> St. 1891, c. 358.

(1891).

<sup>2</sup> *Gibson, appellant*, 154 Mass. 378    <sup>3</sup> P. S., c. 139, § 7.

pointed guardian of said *Thomas Smith*, agreeably to the law in such case made and provided.

Dated this *second* day of *January*, A. D. 1896.

*John Smith,*

*Thomas Smith.*

The probate court must then issue an order of notice<sup>1</sup> to the alleged insane person to appear at court on a day named therein, to show cause, if any he has, why a guardian should not be appointed, and this notice is served by delivering to the alleged insane person a copy of the same fourteen days at least before the return day stated therein for the hearing of the complaint.<sup>2</sup>

If the insane person is a married woman, her husband must either assent, or be given such notice of the petition as the court may order.<sup>3</sup>

Such alleged insane person is entitled to have the court make an allowance, to be paid by the guardian, if appointed, for all reasonable expenses incurred by the ward in defending himself against the complaint.<sup>4</sup>

After a hearing, if it appears to the court that the respondent is an insane person, and incapable of taking care of himself, it will be so decreed, and also that a person named therein<sup>2</sup> be appointed guardian, he first giving bond with sufficient sureties for the due performance of the trust.

#### OF SPENDTHRIFTS.

When a person, by excessive drinking, gaming, idleness, or debauchery of any kind, so spends, wastes

<sup>1</sup> This is also true in case of the <sup>2</sup> P. S., c. 139, § 7.

appointment of a new guardian. <sup>3</sup> P. S., c. 139, § 13.

*Allis v. Morton*, 4 Gray 63 (1855).

<sup>4</sup> P. S., c. 139, § 10.

or lessens his estate as to expose himself or his family to want or suffering, or any city or town to charge or expense for his support or for the support of his family, the overseers of the poor of the city or town of which such spendthrift is an inhabitant or resident, or upon which he is or may become chargeable, or a relation or relations of such spendthrift, may present a complaint to the probate court, setting forth the facts and circumstances of the case and praying to have a guardian appointed. In towns in which overseers of the poor are not specially chosen and in which the selectmen act as overseers of the poor, the selectmen may present such complaint.<sup>1</sup>

The following is the form of a petition for the guardianship of a spendthrift:—

To the Honorable the Judge of the Probate Court in and for the County of *Essex*:

Respectfully complain *John Allen, Charles Wildes and Amos Rhoades, selectmen* [or, *overseers of the poor*] of the town of *Danvers* [or, *John Allen, Charles Wildes, Amos Rhoades, Lil-born Andrews, Martin Fellows and Kendall Walpole, overseers of the poor of the city of Salem*], in said county, that in their judgment *Amos Armstrong*, an inhabitant or resident of said *Danvers*, does, by excessive drinking [or, *debauchery*; or, *gaming*; or, *idleness*], so spend, waste and lessen his estate, as to expose himself and family to want or suffering; and does also thereby expose said town of *Danvers* to charge or expense for his and their support.

Wherefore they pray that *John Smith*, or some other suitable person, may be appointed guardian of the person and es-

<sup>1</sup> St. 1897, c. 173.



tate of said *Amos Armstrong*, agreeably to the law in such case made and provided.

Dated this *twentieth day of May*, A. D. 1895.

*John Allen,*

*Charles Wildes,*

*Amos Rhoades,*

*Selectmen of the Town of Danvers.*

Upon this complaint the court will issue an order of notice, which must be served on the respondent by delivering him a copy of the notice fourteen days at least before the time appointed for the hearing of the complaint and stated therein. If the ward is a married woman, her husband must either assent, or be given such notice of the petition as the court may order.<sup>1</sup> The return of service must be under oath.

If after a hearing upon the complaint, it appears to the court that the alleged spendthrift does by excessive drinking, gaming and idleness, so spend, waste and lessen his estate, as to expose himself and family to want and suffering; and does also thereby expose the town named in the complaint to charge or expense for his and their support, it will be decreed that a guardian be appointed of his person and estate, and that a certain person named in the decree be appointed such guardian, he first giving bond, with sufficient sureties, for the due performance of the trust.

#### GUARDIANS TO RELEASE DOWER AND HOMESTEAD.

When a married woman is by reason of insanity or infancy incompetent to release her right of dower or of homestead, a guardian may be appointed for her in

<sup>1</sup> P. S., c. 139, § 13.

the same manner as if she were sole, and with the powers and duties given to guardians of married women owning property, and the husband or any suitable person may be appointed such guardian.<sup>1</sup> The following is the form of a petition for that purpose :—

To the Honorable the Judge of the Probate Court in and for the County of *Essex* :

Respectfully represents *John Thomas*, of *Salem*, in said county, that he is seized of a certain parcel of real estate situate in *Salem*, in said county, and described as follows [Describe premises by metes and bounds]; that he is desirous of conveying said real estate in fee, but that *Ann Thomas*, his wife, is incompetent, by reason of insanity [or, *infancy*], to release her right of dower [or, and *homestead*] in the same; that the interests of your petitioner require that such conveyance should be made, and that the right of his said wife in said real estate should be released.

He therefore prays that *he* [or, *John Thomas of said Salem*] may be appointed guardian of said *Ann Thomas*, and that such guardian may be authorized and empowered to join him in a conveyance of said real estate for the purpose of releasing her right of dower [or, and *homestead*] therein.

Dated this *first* day of *January*, A. D. 1894.

*John Thomas.*

Notice on this petition is to be given as though she was a *feme sole*, in the ordinary manner; the husband also being given such notice of the petition as the court may direct, unless he is the petitioner.<sup>2</sup>

The decree will be in the following form :—

On the petition of *John Thomas*, of *Salem*, in said county of *Essex*, representing that he is the owner of certain real estate

<sup>1</sup> St. 1890, c. 259.

<sup>2</sup> P. S., c. 139, § 13.

situate in *Salem*, in said county, and described as follows [Describe premises by metes and bounds]; that he is desirous of conveying the same; and that *Ann Thomas*, his wife, is an insane person [or, *a minor*], and is therefore incompetent to release her right of dower [or, *and homestead*] in said real estate; and praying that *he* the guardian of said *Ann Thomas*, may be authorized to release her said rights in said real estate; and said *John Thomas*, and all other parties in interest, having been duly notified, and no one objecting [or, *after due hearing*], the court being satisfied that said right of dower [or, *and homestead*] ought to be released, it is decreed that said guardian be authorized to make said release by joining in any deed of conveyance made by said *John Thomas*, or any trustee for him, within five years next after the date of this decree, whether such deed pass the whole or only separate parcels or lots of said real estate, the said *John Thomas* first paying over to said guardian the sum of *five hundred*<sup>1</sup> dollars, to be invested and held by said guardian for the benefit of the said wife, if she survives her said husband, the income of said sum to be received and enjoyed by him during his life, or until otherwise ordered by said court, and the principal to be paid over to him if he survives her.

#### TEMPORARY GUARDIANS.

Whenever an appeal is taken from the decision of the probate court appointing a guardian of a minor or insane person, said court may, upon the petition of any friend or person in interest, with or without notice, appoint a temporary guardian; and in case of appeal from such appointment such temporary guardian nevertheless proceeds in the execution of his duties until otherwise ordered by the supreme court.<sup>2</sup>

<sup>1</sup> The present value of the dower or homestead right, or both.      <sup>2</sup> St. 1897, c. 135, § 1.

Such temporary guardian, until otherwise ordered, or until his removal or the appointment of a permanent guardian, has the same powers and performs the same duties with regard to the person and estate of the ward as a permanent guardian, and may be decreed the custody of the person of minors if the court finds the parent or parents unfit to have such custody, or if it finds one of them unfit therefor and the other consents to such custody by the temporary guardian.<sup>1</sup>

Such temporary guardian before entering on the duties of his trust must give bond with sufficient sureties, in such sum as the court may order, payable to the judge of probate and his successors, and with condition that he will make and return to the probate court within such time as it orders, a true inventory of all the personal estate of the ward which at the time of making such inventory has come to his possession or knowledge, and that he will, whenever required by the probate court, truly account on oath for all the estate of the ward that may be received by him as such temporary guardian, and will deliver the same to any person who may be appointed guardian or may be otherwise lawfully authorized to receive the same.<sup>2</sup>

Upon the application of the mayor of a city, of the selectmen of a town, or of the overseers of the poor of a city or town, the probate court may, pending proceedings for the appointment or removal of a guardian of a minor, appoint some suitable person to be temporary guardian of such minor during the pendency of such proceedings ; and the person appointed

<sup>1</sup> St. 1897, c. 135, § 2.

<sup>2</sup> St. 1897, c. 135, § 3.

such temporary guardian has the custody and control of the minor until such proceedings are terminated. The probate court having jurisdiction may at any time, with or without notice, terminate such temporary guardianship.<sup>1</sup>

#### BOND.

The form of a guardian's bond in all cases, that is, whether the ward is a minor, an insane person, or a spendthrift, is the same as that of an administrator, except the condition, which is as follows:—<sup>2</sup>

The condition of this obligation is such that if the above-bounden *John Smith*, guardian of *Amos Armstrong*, of *Danvers*, in said county of *Essex*, farmer,<sup>3</sup> minor [or, *insane person*; or, *spendthrift*], shall:—

First, make and return to said Probate Court, at such time as it may order, a true inventory of all the real and personal estate of said ward that at the time of the making of such inventory shall have come to the possession or knowledge of said guardian;

Second, manage and dispose of all such estate, according to law and for the best interests of said ward, and faithfully discharge his trust in relation to such estate, and to the custody, education<sup>4</sup> and maintenance of said ward;

Third, render upon oath, at least once a year, until his trust is fulfilled, unless he is excused therefrom in any year by said court, a true account of the property in his hands, including the proceeds of all real estate sold or mortgaged by him, and of the management and disposition thereof, and also render such account at such other times as said court may order; and.

<sup>1</sup> P. S., c. 139, § 6.

<sup>2</sup> P. S., c. 139, § 22.

<sup>3</sup> Give occupation if an insane person or a spendthrift.

<sup>4</sup> In case of a spendthrift or an insane person cross out the word "education." P. S., c. 139, § 11.

Fourth, at the expiration of *his* trust, settle *his* account in said court, or with said ward or *his* legal representatives, and pay over and deliver all the estate remaining in *his* hands, or due from *him* on such settlement, to the person or persons lawfully entitled thereto;

Then this obligation to be void, otherwise to remain in full force and virtue.

The bonds of guardians should be accompanied with a statement showing the amount of both real and personal estate belonging to the ward signed by the guardian, and also obtain, if convenient, the certificate of some one having personal knowledge of the sufficiency of the sureties, as in the case of administrators' bonds. Blank forms for this purpose are printed on the back of the blank bonds issued by the court.

A testamentary guardian must give a surety or sureties on his bond, unless exempted therefrom in the will.<sup>1</sup>

When a bond without sureties has been approved by the court, the court may at any time, when it deems it proper by reason of a change in the situation or circumstances of the guardian, or for other sufficient cause, require him to give a new bond with a surety or sureties.<sup>2</sup>

In the case of a minor, when his custody is given to his guardian because his parent or parents are unfit to have such custody, the court may allow such guardian to give a bond without sureties.<sup>3</sup>

The guardian must cause an inventory to be made in the same manner, etc., as an administrator;<sup>4</sup> but

<sup>1</sup> P. S., c. 139, § 23.

<sup>2</sup> P. S., c. 139, §§ 24, 25.

<sup>3</sup> P. S., c. 139, § 25.

<sup>4</sup> P. S., c. 139, § 37.



he does not have to give any notice of his appointment.

#### APPOINTMENT OF AGENT.

Every guardian appointed in this commonwealth, but residing without, must appoint an agent residing herein, the same as foreign trustees.<sup>1</sup> See page 262.

#### INVENTORY.

Guardians must return an inventory of their ward's estate the same as administrators. See page 117.

#### RESIGNATION AND REMOVAL OF GUARDIAN.

##### *Resignation.*

A guardian may resign his trust if the court which appointed him will allow him to do so.<sup>2</sup> For the form of petition for this purpose see resignation of an administrator, page 113.

##### *Removal.*

A guardian may be removed by the court which appointed him for cause, after notice to him and to all other persons interested.<sup>3</sup> For the form of petition for this purpose see removal of an administrator, page 114.

#### EMBEZZLEMENT, ETC., OF WARD'S PROPERTY.

When any person is suspected of having embezzled, fraudulently received, or conveyed away, or

<sup>1</sup> St. 1889, c. 462.

<sup>2</sup> P. S., c. 139, § 21.

<sup>3</sup> P. S., c. 139, § 21. Conduct of a guardian tending to alienate the affections of his infant ward from its mother, who is a person of good

character, is a sufficient cause for his removal. *Perkins v. Finnegan*, 105 Mass. 501 (1870). Mere unsuitableness, without misconduct, is sufficient. *Gray v. Parke*, 155 Mass. 433 (1892).

concealed the property of a ward, proceedings may be had in the probate court in the same manner as in the case of a deceased person.<sup>1</sup> See page 124.

#### GENERAL DUTIES OF GUARDIANS.

They must pay all legal debts of the ward out of the personal estate, if sufficient, and collect all debts due to him, or, with the approbation of the probate court, compound for the same; appear for the ward in all legal proceedings except between themselves, unless another person is appointed for that purpose as guardian *ad litem*, or next friend;<sup>2</sup> manage the estate of the ward frugally; and apply the income and profits thereof, so far as may be necessary, to the comfortable and suitable maintenance and support of the ward and his family; and, also, sell the estate for such maintenance, if the income is insufficient therefor.<sup>3</sup>

Upon the application of the guardian of an insane person, or of a child, or the guardian of a child of an insane person, and after notice to all other persons interested, the probate court may authorize and require the guardian of such insane person to apply a portion of the income of the property of the ward, which is not required for his maintenance, to the support of his children.<sup>4</sup>

The probate court may make an allowance out of the estate of an insane ward for the support of his wife, to be paid to her by the guardian during the continuance of the guardianship in such manner as the court directs.<sup>5</sup>

<sup>1</sup> P. S., c. 139, § 42.

<sup>4</sup> P. S., c. 139, § 33.

<sup>2</sup> P. S., c. 139, § 29.

<sup>5</sup> P. S., c. 139, § 34.

<sup>3</sup> P. S., c. 139, § 30.

The probate court may, after notice to all persons interested, authorize guardians to obtain by purchase the release and conveyance of a right of dower, homestead, life estate, estate for years, or other interest, vested or contingent, held or owned by any person, in or to any real estate of their wards, and to make any contract concerning such rights or interests which may be necessary to effect such purchase.<sup>1</sup>

The probate court may, on the application of a guardian or of any person interested in the estate of the ward, and after notice to all other persons interested therein, authorize or require the guardian to sell and transfer any personal estate held by him as guardian, and to invest the proceeds thereof, and all other moneys in his hands, in any manner that may be most for the interest of all concerned. The court may make further order and give such directions as the case may require for the management, investment, and disposition of the estate in the hands of the guardian.<sup>2</sup>

When a resident ward, having a guardian appointed in the commonwealth, removes out of the state, the guardian may sell the real estate of the ward, and transfer and pay over the whole or any part of the proceeds and the whole or any part of the ward's personal estate to a guardian, trustee, or committee, appointed by competent authority in the state or country within which the ward resides, upon such terms and in such manner as the probate court for the county in which any such real or personal estate is found may decree upon petition filed therefor, and

<sup>1</sup> P. S., c. 139, § 35.

<sup>2</sup> P. S., c. 139, § 38.

after notice to all parties interested.<sup>1</sup> Also, when a ward residing out of the commonwealth has no guardian here, and has personal assets in the hands of an administrator, executor, or trustee in this state.<sup>2</sup>

The guardian of a ward, both residing without the commonwealth, but having real estate and no guardian here, may file an authenticated copy of his appointment in the probate court for the county in which the real estate is situated, and be licensed to sell the real estate in every county, in the same way as that of a resident ward is sold.<sup>3</sup> If such foreign guardian has given bond to account for the proceeds of such sale, with sufficient surety or sureties in the state of his appointment, and an authenticated copy of such bond is filed here, no other bond will be required; otherwise, he must give bond with surety or sureties for that purpose.<sup>4</sup>

#### SPECIFIC PERFORMANCE.

When a person has become legally bound, by an instrument in writing, to make a conveyance of real estate, and is put under guardianship before the conveyance is made, the probate court may enforce a specific performance of the agreement, upon the petition of any person interested in the conveyance. Notice of the petition must be given to all persons interested; and the court may then order the guardian to make the conveyance.<sup>5</sup> The petition therefor is in the following form:—

<sup>1</sup> P. S., c. 139, § 39.

<sup>2</sup> P. S., c. 139, § 40.

<sup>3</sup> P. S., c. 140, § 9.

<sup>4</sup> P. S., c. 140, § 10.

<sup>5</sup> P. S., c. 142, § 1.

To the Honorable the Judge of the Probate Court in and for the County of Essex:

Respectfully represents John Smith of Merrimac, in said county, that Thomas Jones of Salisbury, in said county, an insane person, and now under guardianship, at a time previous to such guardianship, to wit, on the second day of May, A. D. 1890, entered into an agreement in writing with your petitioner, a copy of which agreement is hereto annexed, whereby said Thomas Jones agreed with your petitioner to convey to him, upon the terms and conditions set forth in said agreement, certain real estate situate in said Merrimac, and fully described in said agreement; that said Thomas Jones has not made such conveyance, and is not now competent to make the same by reason of such guardianship; and that your petitioner is ready to perform all the conditions of said agreement on his part.

Wherefore your petitioner prays that a specific performance of said agreement may be decreed, and that Anne Jones, guardian of said Thomas Jones, may be ordered to convey said real estate to him agreeably to the terms thereof.

Dated this first day of July, A. D. 1890.

John Smith.

#### SALE OF WARD'S REAL ESTATE.

##### *For Maintenance.*

*At Public Sale.*—If real estate is among the assets of the estate of a ward, and it is necessary to sell it for the maintenance of himself and his family, the guardian may petition the probate court which appointed him for license to sell and convey the same.<sup>1</sup> The following is the form of petition for such purpose, when the sale is to be at public auction:—

<sup>1</sup> P. S., c. 140, §§ 1, 3, 13. Sales may be examined into. See page 184.

To the Honorable the Judge of the Probate Court in and for  
the County of *Essex* :

Respectfully represents *John Smith*, guardian of *Thomas Jones*, of *Danvers*, in said county of *Essex*, minor [or, *an insane person* ; or, *spendthrift*] ; that said ward is interested in certain real estate, to wit: [Describing it by metes and bounds, and stating its condition, whether buildings are on it, and if so their use, etc. If the sale of a sufficient specific part of the estate would be detrimental to the sale of that, or the remainder of it, it should be so represented in the petition<sup>1</sup>] ; that it is necessary that said ward's interest therein be sold for his maintenance, for the reason that the income of his estate is insufficient to maintain him, and that *he has no other source of income* [etc.].

Wherefore said guardian prays that he may be licensed to sell and convey the same, agreeably to the law in such case made and provided.

Dated this *fourth* day of *April*, A. D. 1895.

*John Smith.*

The next of kin and heirs apparent or presumptive of the ward<sup>2</sup> may assent to the petition by signing an assent substantially in the following form :—

The undersigned, being all the persons interested, hereby assent to the foregoing petition.

If they do not assent in writing, they must be notified in such way as the court may order,<sup>3</sup> generally by delivering a copy of the citation issued on the petition to each of them, fourteen days before the return day named therein, or by publishing the citation in a newspaper once a week, for three succes-

<sup>1</sup> P. S., c. 140, § 2.

<sup>2</sup> P. S., c. 140, § 15.

<sup>3</sup> P. S., c. 140, § 16.



sive weeks, the last publication to be one day at least before the return day named therein, as in the ordinary manner of giving notice by publication.

If the ward is insane or a spendthrift, and resides within the commonwealth, the overseers of the poor of the town where he resides must have notice of the petition. They may sign the following assent:—

The undersigned, overseers of the poor for the *town of Danvers*, waive notice and assent to the foregoing petition.

If they do not assent in writing, they must be served with notice. The following is a form of such notice:—

To the Overseers of the Poor of the town of Danvers:

This is to notify you that in the capacity of guardian of Thomas Jones, of said Danvers, an insane person [or, spendthrift], I have petitioned the Probate Court of our county of Essex for license to sell by public auction and convey the following described real estate of said ward for his maintenance, viz.: [Describe the real estate by metes and bounds sufficiently to identify it only]. The said petition will be heard in said court at 9 o'clock A. M., on Monday, May 1, 1895.

John Smith, Guardian.

This notice may be served upon one only of the board of overseers of the poor, and must be served at least seven days before the day of the hearing.<sup>1</sup> The overseers may accept service by signing the following form:—

April 20, 1895. We have received due notice of the hearing on the petition of John Smith, guardian of Thomas Jones of Danvers, insane person [or, spendthrift], to the probate court

<sup>1</sup> P. S., c. 140, § 14.

for our county of Essex, for license to sell at public auction and convey the following described real estate of said ward for his maintenance, viz.: [Describe the real estate only sufficiently to identify it].

John Jackson,

One of the Overseers of Poor of Danvers.

The overseers may assent to the granting of the petition by the following assent:—

COMMONWEALTH OF MASSACHUSETTS.

Essex, ss.

PROBATE COURT.

*Danvers, April 20, A. D. 1895.*

In the matter of the petition of *John Smith*, guardian of *Thomas Jones*, an insane person, praying for license to sell real estate of his ward, now pending in said court.

We, the Overseers of the Poor of the town of *Danvers*, where said ward is an inhabitant or resides, hereby acknowledge due notice of said petition, and make no objection to the granting of the prayer thereof.

*John Jackson,*

*Kendall Loring,*

*Lawrence Ames.*

The decree of sale should state that it appears to be necessary that the ward's interest in the real estate described in the petition, or "in such portion of the ward's real estate as is described as follows" (describing it by metes and bounds<sup>1</sup>), should be sold for his maintenance, and that the guardian be licensed to sell all of the ward's "interest in said real estate for the purposes aforesaid."

Sales must be advertised and conducted as sales by administrators are,<sup>2</sup> and evidence of such sales is to be perpetuated in the same manner.<sup>2</sup>

The notice of sale need not be dated, if no one is

<sup>1</sup> P. S., c. 140, § 2.

<sup>2</sup> P. S., c. 140, § 17.

misled by it.<sup>1</sup> See the case of *Wyman et ali. v. Hooper*,<sup>2</sup> for description of lots of land and statement of time of sale.

In the deed of the guardian, which is similar to that of an administrator, it is unnecessary to state the reason for granting the license and making the sale.<sup>3</sup>

*At Private Sale.*—If an offer has been made for the real estate of the ward, and the petition is for license to convey at private sale, the following is the form of the same:—

To the Honorable the Judge of the Probate Court in and for the County of *Essex* :

Respectfully represents *John Smith*, guardian of *Thomas Jones*, of *Danvers*, in said county of *Essex*, minor [or, *insane person* ; or, *spendthrift*], that said ward is interested in certain real estate, to wit: [Describing it by metes and bounds sufficiently to identify it, and also stating its condition].

[If the interest of the ward is a fractional part only, add, *that the interest of said ward in said described real estate is one-undivided-third part thereof*], that an advantageous offer has been made to your petitioner for said ward's share, to wit, the sum of *one thousand* dollars; that the interest of all parties concerned will be best promoted by an acceptance of said offer, and that it is necessary that said ward's interest therein be sold for his maintenance, for the reason that the income of his estate is insufficient to maintain him.

Wherefore said guardian prays that he may be licensed to sell and convey the same, at private sale, in accordance with said offer, or upon such terms as may be adjudged best, agreeably to the law in such case made and provided.

Dated this *fourth* day of *April*, A. D. 1895.

*John Smith.*

<sup>1</sup> *Brigham, g'd'n, v. Boston & Albany R. R. Co. et al.*, 102 Mass. 14 (1869).

<sup>2</sup> *Wyman et ali. v. Hooper*, 2 Gray (1830).

141 (1854).  
<sup>3</sup> *Sowle v. Sowle*, 10 Pick. 376 (1830).

The petition must ordinarily<sup>1</sup> either be assented to or notice thereof given to all parties interested therein, and, when the ward is insane or a spendthrift, to the overseers of the poor of the place of which the ward is an inhabitant or resident, as in petitions for license to sell for the same cause at public auction.

The decree will grant authority to sell and convey the real estate for the sum named or for a larger amount at private sale. The guardian can, however, sell at public auction, if he pleases, under the same license.<sup>2</sup>

*For Investment.*

If the real estate of a ward is unproductive, etc., the probate court will, in a proper case, upon the petition of any friend of the ward, if a minor, authorize the guardian, or some other suitable person,<sup>3</sup> to sell and convey the same.<sup>4</sup>

If it is to be sold at public auction proceed as in sales for maintenance, page 296; if at private sale, the petition is in the following form:—

To the Honorable the Judge of the Probate Court in and for the County of *Essex*:

Respectfully represents *John Smith*, guardian of *Thomas Jones*, of *Danvers*, in said county of *Essex*, minor [or, *insane person*; or, *spendthrift*], that said ward is interested in certain real estate, to wit: [Describing it by metes and bounds, and stating its condition, etc.]; that an advantageous offer has been made to your petitioner for said ward's share, to wit, the sum of *one thousand* dollars; that the interest of all parties con-

<sup>1</sup> P. S., c. 140, § 18, amended by St. 1885, c. 258.

<sup>2</sup> P. S., c. 140, § 18.

<sup>3</sup> P. S., c. 140, § 7. See § 8, also, in case of a minor.

<sup>4</sup> P. S., c. 140, § 3.

cerned will be best promoted by an acceptance of said offer, and that it will be for the benefit of said ward that his interest therein be sold, and the proceeds thereof put out on interest, or invested in some productive stock, for the reason that *the said real estate is unproductive.*

Wherefore said guardian prays that he may be licensed to sell and convey the same, in accordance with such offer, at private sale, or upon such terms as may be adjudged best, agreeably to the law in such case made and provided.

Dated this *fourth* day of *April*, A. D. 1895.

*John Smith.*

The petition must either be assented to or notice thereof given to all parties interested therein, and, in cases where the ward is insane or a spendthrift, to the overseers of the poor of the place of which the ward is an inhabitant or resident, as in cases of petition for license to sell for maintenance.

The decree should show that it appears that the offer is an advantageous one, and that the interest of all parties concerned will be best promoted by its acceptance, and that it would be for the benefit of the ward that his interest in the real estate sought to be conveyed should be sold, and the proceeds thereof put on interest, or invested in some productive stock, and that it is decreed that the guardian be licensed to sell and convey at private sale, in accordance with the offer, or for a larger sum, all of the ward's interest in the described real estate for the purpose of investment.

Husbands and wives of persons under guardianship may release their rights in real estate of the wards conveyed by their guardians by joining the

guardian in his deed.<sup>1</sup> So in partition of the ward's real estate.<sup>2</sup>

#### SALE OF CONTINGENT INTERESTS, ETC.

The provisions given on page 184, first paragraph, also relate to sales of contingent interests, etc., by guardians.

#### SALE OF LOTS IN CEMETERIES.

The provisions given on page 184, second paragraph, also relate to sales of lots in cemeteries by guardians.

#### SALE OF STANDING OR GROWING WOOD.

When the income of the estate of a ward is insufficient to maintain him and his family, or when it is for his benefit that standing or growing wood on his real estate should be sold, and the proceeds put out on interest or invested in some productive stock, his guardian may sell such wood upon obtaining a license therefor.<sup>3</sup>

To obtain such license the guardian must present to the probate court a petition setting forth the facts and circumstances on which the petition is founded. The license issued upon the decree of the court should specify whether the sale is made for maintenance or investment.<sup>4</sup> The court may order how an investment of this kind shall be made.<sup>5</sup>

#### SALE OF HOMESTEAD RIGHT.

The widow of a deceased person and the guardian of the minor children, when he has obtained a license

<sup>1</sup> P. S., c. 147, §§ 16, 17.

<sup>4</sup> P. S., c. 140, § 4.

<sup>2</sup> P. S., c. 147, § 19.

<sup>5</sup> P. S., c. 140, § 6.

<sup>3</sup> P. S., c. 140, § 3.



therefor from the probate court, as in the case of sales of real estate of minors, may join in a sale of an estate of homestead; or, if there is no widow entitled to rights therein, the guardian may upon obtaining such license make sale of such estate. The probate court may apportion the proceeds of the sale among the parties entitled thereto.<sup>1</sup>

RELEASE OF INSANE WARDS' CURTESY, DOWER AND  
HOMESTEAD.

When the wife of an insane man is desirous of conveying any of her real estate, whether absolutely or by way of mortgage, she may by petition, describing the same, ask the probate court to decree that the estate of the husband as tenant by the curtesy may be released, setting forth the facts and reasons why her prayer should be granted. After notice in some newspaper to all persons interested and a hearing thereon the court, if satisfied that such estate by curtesy ought to be released, shall authorize the guardian of the husband to make such release by joining in any deed of conveyance to be made within five years thereafter, either by the wife or by a trustee for her and whether such deed passes the whole or only separate parcels or lots of said real estate.<sup>2</sup>

If the guardian is so authorized to release the estate by curtesy of his ward and the probate court deems it proper that some portion of the proceeds of such real estate, or of a sum loaned on mortgage thereof, should be reserved for the use of such ward the court may order that a certain portion of such proceeds or sum actually to be realized from such sale or

<sup>1</sup> P. S., c. 123, § 10.

<sup>2</sup> St. 1886, c. 245, § 1.

mortgage, exclusive of any encumbrance then existing on the estate, shall be set aside and paid over to such guardian to be invested and held by him for the benefit of the husband if he survives his wife ; the income of such sum to be received and enjoyed by the wife during the life of her husband, or until otherwise ordered by the court upon good cause shown, and the principal to be hers and to be paid over to her if she survives him, and, if she does not survive him, to be paid over to her heirs, executors or administrators upon his decease.<sup>1</sup>

The law and procedure is the same for the release of an insane woman's dower and homestead right in her husband's real estate ;<sup>2</sup> except that the court may order such notice to parties interested as it pleases ;<sup>3</sup> and the court may decree that a sum not exceeding one-third of the net proceeds of the sale may be set aside and paid over to the guardian to be invested and held by him for the benefit of the wife if she survives her husband ; the income of such sum to be received and enjoyed by the husband during the life of his wife, or until otherwise ordered by the court upon good cause shown ; and the principal to be his, and to be paid over to him if he survives her.<sup>4</sup>

If a homestead right exists in the premises, the court may order that eight hundred dollars or less be paid over to the guardian of the wife, in addition to the said one-third, to be held as the one-third is.<sup>5</sup>

When the husband of an insane woman has con-

<sup>1</sup> St. 1886, c. 245, § 2.

<sup>2</sup> P. S., c. 147, § 20.

<sup>3</sup> St. 1890, c. 105.

<sup>4</sup> P. S., c. 147, § 21.

<sup>5</sup> P. S., c. 147, § 22.

veyed real estate in trust without a power of revocation, and in such conveyance provision is made for his wife, which in the opinion of the probate court, to be certified on petition, and after notice, and hearing, is sufficient in lieu of dower therein, the trustee in such conveyance must be authorized to pass title to such real estate free from all right of dower.<sup>1</sup>

If, in the opinion of the probate court, certified as aforesaid, such provision in lieu of dower of such insane woman in all the real estate owned by her husband at the date of the petition, or in any particular portions thereof, is sufficient her guardian must be authorized to release her dower in all such real estate or in such particular portions by joining in a deed of conveyance of the same.<sup>2</sup>

All these proceedings must be had in the probate court in the county where the wives and husbands of the insane wards reside, if they are inhabitants of this state, and if not, then in some county where any of their real estate is situated; and a certified copy of all final orders or decrees in such proceedings must be recorded in the registry of deeds in every county or district in which such real estate is situated.<sup>3</sup>

#### MORTGAGE OF WARD'S REAL ESTATE.

If the situation of the real estate of a ward is such that money should be raised by mortgage, the guardian may petition the probate court for authority to so mortgage it.<sup>4</sup> The following is the form of such a petition:—<sup>5</sup>

<sup>1</sup> P. S., c. 147, § 23.

<sup>4</sup> P. S., c. 140, § 11.

<sup>2</sup> P. S., c. 147, § 24.

<sup>5</sup> P. S., c. 140, § 12.

<sup>3</sup> P. S., c. 147, § 25; St. 1886, c. 245, § 3.

To the Honorable the Judge of the Probate Court in and for the County of *Essex* :

Respectfully represents *John Smith*, guardian of *Thomas Jones*, of *Danvers*, in said county of *Essex*, minor [or, *insane person* ; or, *spendthrift*], that said ward is interested in certain real estate, to wit: [Describe the lot sought to be mortgaged by metes and bounds sufficiently to identify it, stating its condition]; that said real estate is valued at *five thousand* dollars; and said ward's interest therein is *the whole of it* [or, *one undivided half<sup>1</sup> thereof*]; that it is necessary to raise the sum of *two thousand* dollars for *the purpose of paying debts* [or, *the purpose of improving the property, etc.*], and that the interests of said ward require that said guardian shall have power to mortgage said real estate to raise said sum for the purpose aforesaid.

Wherefore said guardian prays that he may be authorized to mortgage the same, agreeably to the law in such case made and provided.

Dated this *fourth* day of *April*, A. D. 1895.

*John Smith.*

The petition must either be assented to or notice thereof given to all parties interested therein, and, in cases where the ward is insane or a spendthrift, to the overseers of the poor of the place of which the ward is an inhabitant or resident, as in cases of petition for license to sell for maintenance.

The decree should show that it appears that it is necessary and expedient to raise a certain sum of money<sup>2</sup> for a stated purpose, and that the interests of the ward require that the guardian have power to make the mortgage to raise a stated sum for that purpose, and that it is decreed that the guardian be authorized to mortgage all the ward's interest in the

<sup>1</sup> P. S., c. 140, § 11.

<sup>2</sup> P. S., c. 140, § 12.

described real estate to the amount of a certain named sum, at any time within one year from the date thereof, for a term of years stated therein, at a rate of interest not exceeding a stated per centum per annum, payable semi-annually, and by a deed with or without a power of sale clause.

#### LEASE OF WARD'S REAL ESTATE.

The probate court may, on petition of a guardian, if, after due notice and hearing thereon, it appears to be necessary or expedient, authorize such guardian to give a written lease for a term of years, of any real estate of his ward.

The petition should set forth a description of the real estate, the reason why it is necessary or expedient to give a written lease, and the length of the term, and the decree of the court upon such petition must fix the term and the amount for which the real estate may be leased.<sup>1</sup>

#### ACCOUNT.

Accounts of guardians are rendered to the probate court annually, and are in form like those of administrators.<sup>2</sup> They must be rendered under oath; and will not be allowed unless all the persons interested have assented thereto in writing, or have been cited to appear and object to the allowance thereof; and not then, usually, unless it is the final account of the guardian, as otherwise no citation will issue except upon the express order of the court.

If a guardian fails to render his account to the court, the ward or any person for him may peti-

<sup>1</sup> St. 1894, c. 128.

<sup>2</sup> St. 1895, c. 210.

tion the court praying that such account be rendered. The petition is in the same general form as that compelling an administrator to render an inventory, given on page 122; and on this petition proceedings are the same as those compelling an administrator to render an inventory.

#### TERMINATION OF GUARDIANSHIP.

If the ward is a minor, the arrival at age *ipso facto* determines the guardianship, and the guardian must turn the property of the ward over to him or her. The guardian may make out his account and settle it with the court in the ordinary manner, with the ward's consent in writing, or by citation; or, the guardian and ward may settle privately, as they alone are concerned, without filing any account in court. If this is done, care should be taken to have the settlement full and plain, and if the ward is at that time a married woman, it is advisable to have the husband cognizant of the details of the settlement and agreeable thereto. When the terms of the settlement are agreed upon, the ward (and her husband, too, if she has one) may sign a combined receipt and release of the guardian, in the following form:—

Danvers, Sept. 1, 1896.

Received of John Smith, my former guardian, four hundred and eighty dollars in cash, and four shares of stock in the Manchester Manufacturing Company, certificate No. 1,178, being all the personal property in his hands as my said guardian, and in full settlement of his account as my said guardian; and in consideration thereof I do hereby forever release him and his executors and administrators from any further and all liability



to me on account of said guardianship. In witness whereof I hereunto set my hand and seal this day first above written.

Sarah Tomlins [SEAL].

I consent hereto.

George Tomlins.

This release should be recorded in the probate court.

If the ward is an insane person or a spendthrift, the guardianship is determined only upon the death of the ward, unless the insane ward recovers his senses in a degree sufficient to enable him to care for his property, and that it is no longer necessary in case of either ward.<sup>1</sup>

If this occurs, the ward can petition the probate court for release from guardianship, that the guardian be discharged, and that his estate be restored to him. The form of the petition is as follows:—

To the Honorable the Judge of the Probate Court in and for the County of *Essex*:

Respectfully represents *Thomas Jones* of *Danvers*, in the county of *Essex*, farmer, that by a decree of said court, dated the *second* day of *July*, A. D. 1894, he was adjudged to be an *insane person* [or, *spendthrift*], and *John Smith* of *Salem*, in the county of *Essex*, was appointed his guardian; that said *John Smith* accepted the trust, and still continues to have the custody of the person of your petitioner and the management of his estate.

Your petitioner further represents that he believes that he is now capable of managing his own estate, and that such guardianship is no longer necessary.

<sup>1</sup> P. S., c. 139, § 12.

Wherefore your petitioner prays that his said guardian may be discharged.

Dated this *tenth* day of *September*, A. D. 1896.

*Thomas Jones.*

The undersigned, relatives, friends and neighbors of the above-named ward, believing that guardianship of said ward is no longer necessary, hereby concur in his petition for his discharge from said guardianship.

*Andrew Wilson,*

*Bertram Valley,*

*Collin Frazier,*

*Mary Couch,*

*Moses Madison.*

The guardian can give his assent to this petition, but if he does not he must be cited into court to show cause why it should not be granted. The citation is served by delivering a copy thereof to the guardian a certain number of days (stated therein) at least before the time for the hearing named therein, or by publishing the same once in each week, for three successive weeks, in a newspaper named therein, the last publication to be one day at least before the time of the hearing.

The decree must show that the ward is now competent to manage his estate, and that the guardianship is no longer necessary, and that it is decreed, that the guardian be, and he is hereby discharged from his said trust of guardian of said ward.

#### GUARDIANSHIP OF PERSONS WITHOUT THE COMMON-WEALTH.

When a person liable to be put under guardianship resides out of the commonwealth, and has any estate

herein, a friend of such person or any one interested in his estate, in expectancy or otherwise, may apply to the probate court of a county in which there is such estate,<sup>1</sup> and after such notice to all persons interested as the court may order and after a full hearing and examination, a guardian may be appointed for such absent person.<sup>2</sup>

Such guardian gives the bond required for guardian of wards who reside within the state, except that the provisions respecting the inventory, the disposal of the estate and effects, and the account to be rendered by the guardian, is confined to such estate and effects as come to his hands in this commonwealth.<sup>3</sup>

When a person who is a resident of another state or territory of the United States is entitled to property of any description in this commonwealth, and is under the guardianship of a person who is also a resident of such other state or territory, if such guardian produces to the probate court of the county in which such property or the principal part thereof is situated a full and complete and duly exemplified or authenticated transcript from the records of a court of competent jurisdiction in such other state or territory, showing that he has there been appointed such guardian, and has given a bond and security in double the value of the property of such ward, and also shows to such probate court that a removal of such ward's property will not conflict with the terms or limitations attending the right by which the ward owns the same, then

<sup>1</sup> If the estate here consists in part of personal property which is held in trust for him, the probate court for the county where the trustee resides has jurisdiction to appoint the guardian. *Clarke v. Cordis*, 4 Allen 466 (1862).  
<sup>2</sup> P. S., c. 139, § 17.  
<sup>3</sup> P. S., c. 139, § 19.

such transcript may be recorded in such probate court, and such guardian will be entitled to receive from such court letters of guardianship of the estate of such ward which will authorize him to demand, sue for, and recover any such property, and to remove the same out of the commonwealth. Such probate court may also order any resident guardian, executor, or administrator, having any of the estate of such ward, to deliver the same to any person who has taken out such letters of guardianship.<sup>1</sup>

<sup>1</sup> P. S., c. 139, § 20.

## CHAPTER VI.

### PARTITION OF REAL ESTATE.

The jurisdiction of the probate court in making partition of real estate held by joint tenants, coparceners, or tenants in common, depends upon the certainty of the shares of the different owners.<sup>1</sup> If the shares are in dispute and uncertain, the probate court has no jurisdiction, and the partition must be brought in or transferred to the superior court.<sup>2</sup> When so removed the petitioner must enter the same in the superior court and file certified copies of all papers filed in the case.<sup>2</sup>

When proceedings are lawfully commenced in any probate court, such court retains jurisdiction over the case, saving the right of appeal.<sup>3</sup>

Partition may be made although the real estate is leased,<sup>4</sup> or some of the tenants in common may be, alone or jointly with others, trustee, attorney, or guardian of any other tenant.<sup>5</sup>

When remainders or other estates in the premises to be divided are devised or limited to or in trust for persons not in being at the time of the application for partition, notice setting forth the origin and nature of the remainder or interest so devised or limited

<sup>1</sup> P. S., c. 178, § 45.

<sup>4</sup> P. S., c. 178, § 68.

<sup>2</sup> P. S., c. 178, §§ 46, 59.

<sup>5</sup> P. S., c. 178, § 69.

<sup>3</sup> P. S., c. 178, § 64.

must be given as prescribed in P. S., c. 178, §§ 7, 9, to the persons who may be parents of such persons not in being, and the court must appoint a suitable and competent person to appear and act as the next friend of such persons not in being in the partition; the cost of whose appearance and services, including compensation of counsel, to be determined by the court and paid by the petitioners, and execution may issue therefor in the name of the person appointed.<sup>1</sup>

In cases of partition of lands by sale, division or otherwise, where it appears that any part of such lands belongs to persons having different interests therein, so that an estate for life or for a term of years belongs to one person, and remainders therein are devised or limited to other persons, the probate court of the county in which the proceedings are pending may, on petition of any party interested therein, appoint a trustee to receive, hold, manage and invest any distributive share of the money arising from such partition to which such persons may be entitled, the annual income to be paid over to the person in whom was the estate for life, or term of years, for the period such estate might have continued, and the principal, after the termination of such estate, to the persons to whom such remainders were devised or limited, when they can be ascertained and are entitled thereto. Whoever is appointed a trustee for the foregoing purposes must, before entering upon the duties of his trust, give to the judge of the probate court a bond, with sufficient surety or sureties, and in such penal sum as the said judge may direct, conditioned

<sup>1</sup> P. S., c. 178, § 70.



for the faithful performance of his duties ; and such bond upon breach of its condition may be put in suit, by order of the probate court, for the use and benefit of the persons interested in the trust property in like manner as is provided in case of bonds given by administrators.<sup>1</sup>

No petition for partition shall be defeated by reason of the payment by any party thereto of any mortgage, lien, tax, or other incumbrance on the premises when the other parties thereto are entitled to redeem from such payment. But in such case the interlocutory judgment for partition shall contain such terms and conditions in relation to redemption from a contribution on account of such payment as may be in accordance with the rules of equity.<sup>2</sup>

The final decree for partition must not be entered in any case of partition until it is shown to the satisfaction of the court in which the petition is pending that the terms and conditions of the interlocutory decree have been complied with.<sup>3</sup>

### *Division of Water Rights.*

Persons who are interested as joint tenants, tenants in common, or otherwise, in a mill privilege, water right, or other incorporeal hereditament, may be compelled to divide the same. The commissioners appointed to make the partition must set forth in their return the best method of setting off to the several parties their respective shares or interests, and thereupon the court may require the parties interested to perform such acts as justice and equity may require,

<sup>1</sup> St. 1887, c. 286.

<sup>3</sup> St. 1889, c. 468, § 2.

<sup>2</sup> St. 1889, c. 468, § 1.

and may make all such orders and decrees in the premises, according to the course of proceedings in equity, as may be necessary to do justice between the parties.<sup>1</sup> So may partition be made of the water of a natural stream, not navigable, the banks of which are owned by different riparian proprietors.<sup>2</sup>

## PARTITION AMONG HEIRS.

When one or more of the heirs of a deceased person, whose estate is in course of settlement in the probate court, desire partition of the real estate which has descended to them from such deceased person, they may petition such court to make partition thereof among the heirs. The petition is in the following form :—

To the Honorable the Judge of the Probate Court in and for the County of *Essex* :

Respectfully represents *John Smith* of *Salem*, in the County of *Essex*, that he is interested in *all* of the real estate lying in this Commonwealth<sup>3</sup> of *Thomas Smith*, late of *Salem*, in said County of *Essex*, deceased, intestate, whose estate is in course of settlement in said court, claiming to hold as *an heir* of said deceased *one-undivided-fourth* part or share, which he wishes to hold in severalty:\*

That the names and residences of all the other persons now interested, and their respective shares and proportions thereof, are as follows, and are not in dispute nor uncertain:

Name.	Residence.	Share.
<i>Thomas Smith,</i>	<i>Wenham, Maine,</i>	<i>one undivided fourth.</i>
<i>Sarah Jones,</i>	<i>Salem, Mass.,</i>	“ “ “
<i>John Jules,</i>	“ “	<i>one undivided eighth.</i>
<i>Hannah Jules,</i>	“ “	“ “ “

<sup>1</sup> P. S., c. 178, § 76.

<sup>2</sup> P. S., c. 178, § 77.

<sup>3</sup> The real estate need not be de-

scribed in the petition. *Marsh et ali. v. French et ali.*, 159 Mass. 469

(1893).

*The last two parties above named being minors, having no guardian [or, Hannah Smith of said Salem being their guardian].*

Wherefore your petitioner prays that partition may be made of all the real estate aforesaid,<sup>1</sup> according to law.

Dated this *first* day of *January*, A. D. 1896.

*John Smith.*

If the whole or any part of the premises are owned in common with another person or persons not heirs of the deceased, and it is desired that such land be divided also, there must be included in the petition at the asterisk (\*) a statement that certain land, describing it by metes and bounds sufficiently for identification, is held in common by the heirs with others, and giving the names and residences of the co-tenants, and also adding to the prayer at the dagger (†) the words, “including that held by the deceased in common with others, as aforesaid.”<sup>2</sup>

If all the parties interested assent to the petition in writing, a decree of partition will be made without further notice; if not, they must be cited into court. The citation, issued by the court, is served by delivering a copy thereof to each person interested, who can be found within the commonwealth, who has not assented in writing, or waved notice, fourteen days at least before the return day stated therein, and, if any one cannot be so found, by publishing the same

<sup>1</sup> When the petitioner is an heir, partition must be made of such real estate as any party interested requires to have included in the partition. When the petitioner is a devisee, the partition must be of all the estate held by the applicant, jointly or in common with others holding under the testator which he or any other devisee requires to have included. The same rules apply when the petition is brought by a person holding under an heir or devisee. P. S., c. 178, § 54.

<sup>2</sup> P. S., c. 178, § 60.

once in each week, for at least three successive weeks in the newspaper or newspapers<sup>1</sup> named therein, the last publication to be one day at least before the return day. Co-tenants (other than heirs) must be served with an attested copy of the notice issued by the court by delivering it to him, or by leaving it at the place of his abode in this commonwealth fourteen days at least before the return day named therein. The notice must contain a description of the premises to be divided, and a statement of the share claimed as belonging to the estate of the deceased, and the time and place appointed for hearing the case.<sup>2</sup> If any such co-tenant is absent from the commonwealth the probate court may, after public notice of the petition, appoint an agent for such absent party, who shall act for him.<sup>3</sup> The return on this citation must be sworn to, and a certificate of the oath filed in court.

If the court finds that all persons interested therein have had due notice to appear and show cause against the petition, according to law and the order of court, and that the persons named in the petition are interested as therein set out, and that their respective shares or proportions are not in dispute nor uncertain, it will be decreed that partition of the real estate be made, and that three [or five]<sup>4</sup> disinterested persons (naming them) be appointed commissioners to make the partition according to law and the rights of the persons interested, and that a warrant therefor be issued to them.

<sup>1</sup> St. 1882, c. 55,

<sup>2</sup> P. S., c. 178, § 61.

<sup>3</sup> P. S., c. 178, § 62.

<sup>4</sup> P. S., c. 178, § 49.

If any of the parties interested are minors, insane persons or spendthrifts, having no guardian within the commonwealth, the court must appoint a guardian *ad litem* to appear and act for them.<sup>1</sup> And if any heir at law or devisee is absent from the commonwealth the court must appoint an agent to act for him.<sup>2</sup>

The court may issue a warrant for each county, when land lies in two or more counties, if he thinks proper, appointing different commissioners for each county.<sup>3</sup>

Not only may the share of the petitioner be set off,<sup>4</sup> but the residue of the estate may be ordered to be divided among the parties interested, unless two or more of the parties consent to hold their shares together and undivided, when they shall be so jointly set off and assigned.<sup>5</sup>

The commissioners must be sworn to faithfully and impartially execute their duties,<sup>6</sup> must give notice to all parties in interest of the place and time of making the partition, as in setting off dower (see page 150); and if land is held in common with parties other than heirs the interest of the deceased must first be set off to the estate, and then the estate of the deceased thus determined is to be divided among the heirs in proportion to their respective interests.<sup>7</sup> In making the partition it is always advisable to ascertain as nearly as the commissioners can what particular part of the premises the respective heirs would like to have as-

<sup>1</sup> P. S., c. 178, § 53.

<sup>2</sup> P. S., c. 178, § 52.

<sup>3</sup> P. S., c. 178, § 50.

<sup>4</sup> St. 1885, c. 293, under which the remainder may continue in com-

mon, and be subject to a future partition.

<sup>5</sup> P. S., c. 178, § 55.

<sup>6</sup> P. S., c. 178, § 49.

<sup>7</sup> P. S., c. 178, § 60.

signed to them, on account of agreement and satisfaction among them. The return of the commissioners is similar to the return of commissioners in setting off dower and homestead. If the condition of the real estate is such that it is not feasible to assign to each heir an amount of land exactly equal to each one's share, they can assign a lot larger than his share, or the whole, to one or more of the parties, he or they paying the difference to such heir or heirs to whom they have assigned nothing or less than his or her share.<sup>1</sup> No preference need now be made to males, nor to age.<sup>2</sup> The commissioners should endeavor to get the heirs to assent to their report in writing, and when money is to be paid by one heir to another to have the receipt of the payee of it filed with the report in court. If all parties in interest do not assent to the report in writing, they must be cited into court. The partition must be duly confirmed by the court;<sup>3</sup> but before it can be confirmed and established by the court, all sums of money awarded by the commissioners to make the partition just and equal must be paid to the parties entitled thereto, or secured to their satisfaction or to that of the court.<sup>4</sup>

The expense of the partition, ascertained and allowed by the court, must be paid by the parties in proportion to their respective shares, and execution may be issued therefor.<sup>5</sup>

The return of the commissioners, when accepted, remains in the registry of probate; and a copy thereof, certified by the register, must be recorded in the

<sup>1</sup> P. S., c. 178, § 56.

<sup>2</sup> St. 1895, c. 118.

<sup>3</sup> St. 1882, c. 6, § 2.

<sup>4</sup> P. S., c. 178, § 71.

<sup>5</sup> P. S., c. 178, § 58.



registry of deeds for each of the several counties and districts where the lands lie.<sup>1</sup> A decree which states that "the foregoing division, having been duly considered, is hereby ratified and confirmed," is sufficiently formal.<sup>2</sup>

#### PARTITION AMONG TENANTS IN COMMON.

The probate court has jurisdiction in making partition of real estate among tenants in common,<sup>3</sup> and the procedure is the same as in partition among heirs.<sup>4</sup> The petition in such a case is in the following form :—

To the Honorable the Judge of the Probate Court in and for the County of *Essex* :

Respectfully represents *John Smith* of *Salem*, in the county of *Essex*, that he holds as tenant-in-common *one-undivided-half* part or share of the following described real estate, situated in *Salem*, in the county of *Essex*, which he wishes to hold in severalty, to wit: [Describe the real estate by metes and bounds]; that the names and residences of all the other tenants-in-common and their respective shares and proportions thereof are as follows, and are not in dispute nor uncertain: *Thomas Allen of Danvers, Mass., Henry Charles of Windham, Maine, and Sarah Logan of Salem, minor, having no guardian* [or, *Charles Logan, of Salem, Mass., guardian*].

Wherefore your petitioner prays that partition may be made of all the real estate aforesaid, according to law.

Dated this *first* day of *September*, A. D. 1896.

*John Smith.*

The proceedings under this petition are the same as in partition among heirs.

<sup>1</sup> P. S., c. 178, § 75, amended by St. 1888, c. 346, § 3.

<sup>3</sup> P. S., c. 178, § 45.

<sup>4</sup> P. S., c. 178, § 47.

<sup>2</sup> *White v. Clapp*, 8 Met. 365 (1844).

## NEW PARTITION.

The court may for any sufficient reason set aside the return of the commissioners and commit the case anew to the same or to other commissioners, whereupon the same proceedings are had as in the first partition.<sup>1</sup>

If after a first partition any improvements have been made on any part of the premises which by a new partition is taken from the share of the party who made the improvements, he is entitled to compensation therefor, to be estimated and awarded by the commissioners and paid by the party to whom such part of the premises is assigned in the new partition, and the court may issue execution therefor in the common form.<sup>2</sup>

## DIVISION BY SALE.

If the estate to be divided is so situated that it cannot be advantageously divided, application may be made to the court in the following form by one of the heirs or tenants-in-common, asking for the sale of the premises and a division of the proceeds thereof, instead of partition of the property itself, and the court may order the sale when appointing the commissioners, or subsequently, by agreement of the parties, or after such notice to all parties interested as may be required:—<sup>3</sup>

To the Honorable the Judge of the Probate Court in and for the County of *Essex*:

Respectfully represents *John Smith* of *Salem*, in the county of *Essex*, that he holds as tenant-in-common *one-undivided-half*

<sup>1</sup> P. S., c. 178, § 74.

<sup>3</sup> St. 1894, c. 104.

<sup>2</sup> P. S., c. 178, § 72.

part or share of the following described real estate, which he wishes to hold in severalty, to wit: [Describe the real estate by metes and bounds], that the names and residences of all the other tenants-in-common and their respective shares and proportions thereof are as follows, and are not in dispute nor uncertain:

Name.	Residence.	Share.
<i>Orlando Emerson,</i>	<i>Danvers, Mass.,</i>	<i>one-undivided-fourth.</i>
<i>Amos Morse,</i>	<i>Windham, Maine,</i>	<i>one-undivided-eighth.</i>
<i>Sarah Jones, Salem, Mass., minor, having no guardian [or, Charles Logan, Salem, Mass., guardian]; one-undivided-eighth.</i>		

and your petitioner further represents that said real estate cannot be advantageously divided.

Wherefore your petitioner prays that partition may be made of all the real estate aforesaid according to law, and to that end that the commissioners appointed to make said partition be ordered to make sale and conveyance of said real estate at public auction for cash,<sup>1</sup> and to distribute and pay over the net proceeds of the sale in such a manner as to make the partition just and equal.

Dated this *first* day of *January*, A. D. 1896.

*John Smith.*

This petition must either be assented to by the parties interested, or they must be cited into court to show cause why it should be allowed.

If it appears to the court that all persons interested in the petition have been duly notified, and that they are interested as set out in the petition, and that their respective shares or proportions are not in dispute nor uncertain, and, further, that the real estate cannot be advantageously divided, it will be decreed

<sup>1</sup> Or, upon such terms and conditions and with such securities for the proceeds of the sale as the court may order. St. 1894, c. 104.

that partition thereof be made as aforesaid, and that one<sup>1</sup> or three disinterested persons named therein be appointed commissioners to make said partition according to the rights of the parties interested, and that a warrant therefor be issued to them, and that they make sale and conveyance of said real estate at public auction for cash,<sup>2</sup> and when sold to distribute and pay over the net proceeds of the sale in such a manner as to make the partition just and equal, and deposit any share unpaid at the time of confirming the proceedings in the name of the judge of probate in the savings bank therein named.<sup>3</sup>

On the receipt of the warrant issued upon this decree, the commissioner or commissioners will advertise the real estate for sale at public auction, as for sale of lands by administrators.<sup>4</sup> The following is a sufficient form of advertisement:—

#### COMMISSIONER'S SALE OF REAL ESTATE.

Pursuant to a warrant issued by the Probate Court in and for the county of Essex, Massachusetts, to the undersigned as commissioner to make sale and partition among the parties entitled thereto of the hereinafter described real estate, dated February 1, A. D. 1896, will be sold at public auction, on the premises, on Saturday, the fourteenth day of September, A. D. 1896, at three o'clock in the afternoon, the following described lot of land, with the dwelling-house and other buildings there-

<sup>1</sup> St. 1894, c. 104. The court may order a sale after the commissioners have made their report under the general warrant to divide. *Ramsey v. Humphrey*, 162 Mass. 385 (1894).  
<sup>2</sup> Or, upon such terms and condi-

tions, and with such securities for the proceeds of the sale, as the court may order. St. 1894, c. 104.

<sup>3</sup> P. S., c. 178, § 67.

<sup>4</sup> St. 1894, § 104.

on, situate in Salem, in said county of Essex, viz.: [Describe the real estate by metes and bounds].

TERMS: \$100 down, and remainder within ten days from the day of sale.

Samuel T. Vollon,  
Commissioner.

Salem, Aug. 5, 1896.

The conveyance must be made by the commissioner or commissioners,<sup>1</sup> and is in form like that of an administrator under a license for sale at public auction. The evidence of the sale may be perpetuated as in sales of real estate by administrators, by an affidavit filed in the probate office.<sup>1</sup>

The payment of the shares of the proceeds is made in a way similar to that of distributive shares of an estate under an order of court.

<sup>1</sup>St. 1894, § 104.

## CHAPTER VII.

### ADOPTION AND CHANGE OF NAME OF CHILD.

To adopt a child it is necessary to petition the probate court for the county in which the petitioners reside, if resident in the commonwealth; if not so resident, then in the county in which the person to be adopted resides; and the petitioners must be the would-be adopted parents of the child.<sup>1</sup> The petition for such adoption is in the following form:—

To the Honorable the Judge of the Probate Court in and for the County of *Essex*:

Respectfully represents *John Smith* of *Salem*, in said county, farmer, and *Mary Smith*,<sup>2</sup> his wife, that they are of the age of twenty-one years or upwards, and are desirous of adopting *Leon Harpstrung* of *Lynn*, in said county, a child of *James Harpstrung* of *Lynn*, in the county of *Essex*, and *Martha Harpstrung*, his wife, *the latter being deceased*, which said child was born in *Lynn*, in said county, on the *second day of October*, A. D. 1891.<sup>3</sup>

Wherefore *they* pray for leave to adopt said child, and that his name may be changed to that of *Leon S. Smith*.

Dated this *first day of September*, A. D. 1896.

*John Smith,*

*Mary Smith.*

<sup>1</sup> P. S., c. 148, § 1.

<sup>2</sup> If the petitioner is married his wife or her husband must join in the petition. P. S., c. 148, § 1.

<sup>3</sup> The person adopted must be

younger than the petitioner, unless the person adopted is his or her wife, husband, brother, sister, uncle, or aunt, either of the whole or half blood. P. S., c. 148, § 1.



In case the person to be adopted is above the age of fourteen years, his consent in writing must be obtained.<sup>1</sup> The following is the ordinary form of consent:—

I, the child above named, being above the age of fourteen years, hereby consent to the adoption as above prayed for.

*Leon Harpstrung.*

No adoption can be decreed without the express consent (or implied consent after notice as hereinafter stated) of the adopted person's husband, in case of a married woman; of the lawful parents, or surviving parent, or the parent having the lawful custody of the child, if the parents are divorced or living separate; of the guardian of the child, if any; of the mother only of the child, if illegitimate;<sup>2</sup> of the previous adopted parent or parents in case of a subsequent adoption;<sup>1</sup> or of the person or persons, etc., hereinafter stated. If the person to be adopted is of age, only the consent of herself and her husband, if a married woman, is required. And the consent of none of the persons required above, other than the person to be adopted, is required, if such other person is adjudged by the court hearing the petition to be hopelessly insane, or is imprisoned in the state prison or in a house of correction in this commonwealth under sentence for a term of which more than three years remain unexpired at the date of the petition; or if he has wilfully deserted and neglected to provide proper care and maintenance for such child for two years next preceding the date of the petition;

<sup>1</sup> P. S., c. 148, § 2.

<sup>2</sup> *Gibson, appellant*, 154 Mass. 373 (1891).

or if he has suffered such child to be supported for more than two years continuously, prior to the petition, by a charitable incorporated institution, or as a pauper by a city or town or by the commonwealth; or if he has been convicted of being a common drunkard, and neglects to provide proper care and maintenance for such child; or if such person has been convicted of being a common night-walker, or a lewd, wanton, and lascivious person, and neglects to provide care and maintenance for such child. A giving up in writing of a child, for the purpose of adoption, to a charitable incorporated institution, operates as a consent to any adoption subsequently approved by such institution. Notice of the petition must be given to the state board of lunacy and charity in case the child is supported as a pauper by a city or town or by the commonwealth.<sup>1</sup>

The written consent of the required parties to the adoption, other than the person adopted, is ordinarily in the following form:—

The undersigned, being the *father* [or, *guardian*; or, *husband*; etc.] of said child, hereby consents to the adoption as above prayed for.

*James Harpstrung.*

When such parties do not consent in writing, the court must order notice by personal service on the parties of a copy of the petition and order thereon, seven days at least before the return stated in the order, or, if they are not found within the commonwealth, by publishing the same once in each week, for three successive weeks, in a newspaper published

<sup>1</sup> P. S., c. 148, § 3, amended by St. 1896, c. 101, § 4.

named therein, the last publication to be seven days at least before said return day, and in any case the court may require such additional notice and consent as may be deemed proper.<sup>1</sup>

The return on this citation must show in which manner the notice was served, and be sworn to and a certificate thereof in the ordinary form attached.

If such person does not appear, or, if appearing, does not object thereto, he is held to have consented to the adoption so far as it relates to the proceeding in the probate court. He may appeal, however.<sup>2</sup>

If no one consents or appears the court may appoint a guardian *ad litem* with power to give or withhold consent.<sup>2</sup> Such appointment is in the following form :—

On the foregoing petition, it appearing that no one appears to consent or object thereto, *Aaron Lanson*, is hereby appointed guardian *ad litem* of said child, with power to give or withhold consent.

If the court is satisfied of the identity and relations of the persons, and that the petitioners are of sufficient ability to bring up and furnish said child with suitable nurture and education, having reference to the degree and condition of his parents, and that it is fit and proper that such adoption should take place, it must decree that from the day of the date of the decree the child shall, to all legal intents and purposes, be the child of said petitioners, and that his name be changed to that of the name prayed for (stating it), which he shall hereafter bear, and which shall be his legal name.<sup>3</sup>

<sup>1</sup> P. S., c. 148 § 4.

<sup>3</sup> P. S., c. 148, § 6.

<sup>2</sup> P. S., c. 148, § 5.

## CHAPTER VIII.

### CHANGE OF NAME.

Any person residing within the jurisdiction of a probate court may petition such court for a change of his name, which will be duly granted if he or she shows a sufficient reason for the change.<sup>1</sup> The petition is in the following form:—

To the Honorable the Judge of the Probate Court in and for  
the County of *Essex* :

Respectfully represents *John Smith* of *Salem*, in said county, that he was born in *Worcester*, in the county of *Worcester*, and State of *Massachusetts*, on the *second* day of *March*, A. D. 1849, that he has heretofore resided in the following places only: *Worcester and Salem, in Massachusetts* ; that his occupation is that of a *merchant*, and that he wishes to change his name to that of *John Leader*, for the reason that *ever since he came to Salem, in 1870, he has been commonly called, and has always done business under the name of John Leader, and that it is generally supposed that John Leader is his true and legal name.*

Wherefore your petitioner prays that his name may be changed, and that he may take the name of *John Leader*, as aforesaid.

Dated this *first* day of *May*, A. D. 1897.

*John Smith.*

The court must issue a citation upon this petition<sup>2</sup> which is to be served by publishing it once in each

<sup>1</sup> P. S., c. 148, § 12.

<sup>2</sup> P. S., c. 148, § 13.

week, for three successive weeks in the newspaper named therein, the last publication to be one day at least before the return day named therein. The return on this citation must be in writing and sworn to, and a certificate of the oath filed in court. If no objection is made, and it appears to the court that the reason given therefor is sufficient, and consistent with the public interest and satisfactory to the court, it will be decreed that the petitioner's name be changed, as prayed for, to that of (stating it), that he shall thereafter bear that name (stating it), that it shall be his legal name, and that he give public notice of said change by publishing the decree once in each week, for three successive weeks, in a newspaper named in the decree and make return to the court under oath that such notice has been given.

After publishing the decree as ordered therein, and having made return of such publication under oath, the court will issue a certificate of change of name.<sup>1</sup>

<sup>1</sup> P. S., c. 148, § 13.

## CHAPTER IX.

### SEPARATE MAINTENANCE, ETC.

When a husband fails, without just cause, to furnish suitable support for his wife, or has deserted her, or when the wife, for justifiable cause, is actually living apart from her husband, the probate court may, by its order on the petition of the wife, or, if she is insane, on the petition of her guardian or next friend, prohibit the husband from imposing any restraint on her personal liberty for such time as the court directs, or until the further order of the court thereon, and the court may, upon the application of the husband or wife, or of her guardian, make such further order as it deems expedient concerning the support of the wife, and the care, custody, and maintenance of the minor children of the parties, and may determine with which of their parents the children or any of them shall remain; and may from time to time, on a similar application, revise and alter such order, or make a new order or decree, as the circumstances of the parents or the benefit of the children may require.<sup>1</sup>

<sup>1</sup> P. S., c. 147, § 33. It is no bar to this petition, that, for a valuable consideration, received and retained by her, the wife has executed an instrument releasing him from all claim by her on him for support, and agreeing to indemnify him from any such claim. *Silverman v. Silverman*, 140 Mass. 560 (1886). If the husband is a spendthrift under guardianship, a decree cannot be made against the guardian. *Kavanaugh v. Kavanaugh*, 146 Mass. 40 (1888). Such a decree is a bar to a libel



The petition may be brought in the county in which either of the parties lives, except that, if the petitioner has left the county in which the parties have lived together, the adverse party still living therein, the petition must be brought in that county.<sup>1</sup>

Upon such a petition, an attachment of the husband's property may be made as in the case of a libel for divorce.<sup>2</sup>

The form of the petition is as follows :—

To the Honorable the Judge of the Probate Court in and for the County of *Essex* :

Respectfully represents *Mary Smith* of *Salem*, in the county of *Essex*, that she is the lawful wife of *John Smith*, of said *Salem*, that her said husband fails, without just cause, to furnish suitable support for her, and has deserted her; and that she is living apart from her said husband for justifiable cause [and she herein sets forth the following specifications: *That he has many times cruelly abused her, striking her, and threatening to kill her*; etc.<sup>3</sup>]; that there have been born to them the following children:

*Sarah Smith,*

*Mary Smith,*

*James Smith, all of whom are minors.*

for divorce on the ground of the wife's desertion, while it remains in force. *Miller v. Miller*, 150 Mass. 111 (1889).

The husband need not have notice, expressly or impliedly, that at the time of filing her petition, his wife is actually living apart from him for justifiable cause. *Smith v. Smith*, 154 Mass. 262 (1891).

The husband may be ordered to contribute toward the support of his wife, although his only means is a United States pension. *Tully v. Tully*, 159 Mass. 91 (1893).

The court may proceed against the property of the husband, although he resides without the commonwealth. *Blackinton v. Blackinton*, 141 Mass. 432 (1886).

<sup>1</sup> P. S., c. 147, § 34.

<sup>2</sup> P. S., c. 147, § 35. P. S., c. 146, §§ 15, 33, 37, apply to such proceedings as far as they are applicable.

<sup>3</sup> These specifications need not be made if the prayer does not include an order prohibiting her husband from imposing restraint on her personal liberty.

Wherefore your petitioner prays that said court will [by its order, prohibit her said husband from imposing any restraint on her personal liberty, and<sup>1</sup>] make such order as it deems expedient concerning her support, and the care, custody and maintenance of said minor children.

Dated this *first* day of *September*, A. D. 1896.

*Mary Smith.*

If an attachment of the husband's property is desired, the judge should endorse the petition, as follows :—

*Essex*, ss. *Sept. 1*, A. D. 1896.

Let attachment issue as prayed for, to the amount of *five hundred* dollars.

*Anson N. Nehan,*

Judge of Probate Court.

The citation on this petition is served by delivering to the husband a copy thereof fourteen days at least before the return day named therein, if he may be found in the commonwealth, but if not so found, by delivering to him such copy wherever found, or by leaving it at his usual place of abode ; or by mailing the same to him at his last known post office address fourteen days at least before the return day ; and also, unless it is made to appear to the court by affidavit that he has had actual notice of the proceedings, by publishing the same once in each week for three successive weeks in a newspaper named in the citation, the last publication to be one day at least before the return day.

<sup>1</sup>That part of the prayer here included in brackets should be stricken out unless it is based upon specifications.

The return on the citation, which must be made under oath, must show how it was served.

The decree follows the prayer of the petition, and must state the amount and times when the money is to be paid. The court cannot, without the consent of both parties, order a sum in gross for the future support of the wife.<sup>1</sup>

#### APPOINTMENT OF RECEIVER.

When a person having a wife or minor child, who, if he were alive and resident in this commonwealth, would be dependent upon him wholly or partly for support, has while such resident absented himself from his place of residence without making sufficient provision for such support, and his whereabouts are unknown, or, being known, he is residing without the commonwealth, the probate court, upon petition of such wife or child, or the guardian of such wife or child, or of any other interested person, and after public notice and without establishing the fact whether such person is dead or alive, may appoint a receiver for all the property of such absentee, who, under the instructions of such court, may apply said property, including the inchoate right of curtesy in real estate, in payment of such charges as may properly have been incurred, or may thereafter be incurred in the support and maintenance of such wife and minor children. The provisions of law regarding bonds, accounts, sales and mortgages by guardians, apply to such receivers, and upon the return of such absentee the receiver must account in said court

<sup>1</sup> *Doole v. Doole*, 144 Mass. 278 (1887).

for the unexpended balance of his estate, and if letters testamentary or of administration are thereafter granted upon the estate of such absentee as a deceased person, such accounting must be in said court to the administrator or executor. Whenever it is inexpedient longer to continue such receivership, the estate may be deposited in some savings bank or like institution, under P. S., c. 144, § 16, and acts in amendment thereof.<sup>1</sup>

<sup>1</sup> St. 1894, c. 203.

## CHAPTER X.

### CUSTODY AND SUPPORT OF CHILDREN.

Where the parents of minor children live separately, the probate court, upon the petition of either parent, may make decrees concerning their care, custody, education and maintenance, the same as concerning children whose parents are divorced.<sup>1</sup>

Upon the application of a guardian who is entitled to the custody of his minor ward, during the lifetime of both or either of the parents of such ward, and after notice to all parties interested, the probate court may order and require the said parents, or either of them, to contribute to the support and maintenance of such minor in such sums and at such times as, having regard to all the circumstances of the case, may seem just and reasonable. The court may from time to time, on application of either party, revise or alter such order, or make such new order or decree as the circumstances of the parents or the benefit of the minor may require. The court may require the party charged to give a bond to the judge and his successor in such sum and with such sureties as the court may order.<sup>2</sup>

To the Honorable the Judge of the Probate Court in and for  
the County of *Essex* :

Respectfully represents *Sarah Adams* of *Salem*, in the county of *Essex*, that she is the lawful wife [or, *husband*] of *Walter*

<sup>1</sup> P. S., c. 147, § 36.

<sup>2</sup> St. 1891, c. 358.

*Adams*, of said *Salem*, and that your petitioner and said *Walter Adams* are actually living apart from each other; that children have been born to them who are now living, and whose names and dates of birth are as follows:

*John Adams*, born *Jan. 17, 1888*.

*Sarah Adams*, born *March 1, 1891*.

Your petitioner further represents that the happiness and welfare of said children, who are minors, require that she should have custody and possession of them.

Wherefore she prays that said court will make such order as it deems expedient concerning the care, custody, education and maintenance of said minor children, and order that they remain with your petitioner.

Dated this *tenth* day of *September*, A. D. 1896.

*Sarah Adams.*

The respondent parent will be cited into court by delivering to him a copy of the petition and of the citation thereon a certain number of days, to be fixed by the court and stated therein, at least before the return day therein named. Return of this service, in the ordinary manner, must be made under oath.

The decree will provide for the custody, education and maintenance of the children till the further order of the court.



## CHAPTER XI.

### DECREE AUTHORIZING MARRIED WOMEN TO CONVEY PROPERTY.

A married woman, whose husband has absented himself from the commonwealth, abandoning and not sufficiently maintaining her, or whose husband has been sentenced to confinement in the state prison, may, upon her petition, be authorized by the probate court to sell, convey, and receipt for her real and personal estate and any personal estate which may have come to her husband by reason of the marriage, and which remains in the commonwealth undisposed of by him, or to which he is entitled in her right; and to use and dispose of such property or the proceeds thereof, during his absence or imprisonment, as if she was unmarried; and this authority continues until the husband returns into the commonwealth and claims his marital rights, or is discharged from prison, and during that time the wife may do all acts necessary for its full exercise.<sup>1</sup>

Upon petition of a married woman, who is deserted by or living apart from her husband for a justifiable cause, the probate court may make a decree establishing such facts; and thereafter she may make a will in the same manner and with the same effect as if she were sole, and may by such will, or under such cir-

<sup>1</sup> P. S., c. 147, § 31, amended by St. 1887, c. 332, § 2.

cumstances by deed, without her husband's written consent, dispose of all her real and personal estate.<sup>1</sup>

In each of these cases the following form is used :

To the Honorable the Judge of the Probate Court in and for  
the County of *Essex* :

Respectfully represents *Sarah Smith* of *Salem*, in the county of *Essex*, that she is the lawful wife of *John Smith*, of said *Salem* ; that her said husband fails, without just cause, to furnish suitable support for her, and has deserted her, and that your petitioner, for justifiable cause, is actually living apart from her said husband, and that there have been born to them the following children :

*Andrew Smith, John Smith, and Sarah Smith.*

She further represents that she has need to be relieved of the disabilities of coverture so far as to be enabled to dispose of her personal and real estate without her husband's written consent, in the same manner and with the same effect as if she were sole.

Wherefore she prays that said court, after due notice to her said husband and full consideration of the premises, will enter a decree establishing the fact of such desertion, and that such living apart from her husband is on her part for justifiable cause.

Dated this *first* day of *August*, A. D. 1897.

*Sarah Smith.*

Upon this petition the husband will be cited by delivering to him a copy of the citation issued on the petition fourteen days at least before the return day named therein, if he may be found within the commonwealth, or if he is not so found, by either leaving such copy at his usual place of abode, or by mailing it to him at his last known post office address ; and,

<sup>1</sup> St. 1885, c. 255.

also, unless it is made to appear to the court by affidavit that he has had actual notice of the proceedings, by publishing the same once in each of three successive weeks in a newspaper named therein, the last publication to be one day at least before the return day.

The return on the citation must show the manner of service and be under oath.

The decree will be that the said John Smith has deserted the said petitioner, and that she is living apart from him for justifiable cause.

## CHAPTER XII.

### EQUITY.

For jurisdiction of the probate court in equitable proceedings, see page 3.

The following is the form of the ordinary petition in equity:—

To the Honorable the Judge of the Probate Court in and for the County of *Essex*:

Respectfully represents *John Smith* of *Salem*, in the county of *Essex*, petitioner, that he brings this petition against *Warren Hastings* of *Nahant*, in the county of *Essex*, respondent, and alleges them to be all of the parties interested in the matter of said petition [as he is informed and believes<sup>1</sup>], and further represents that [state the allegations plainly and with such fullness and detail as will bring the issue before the court in as concise a manner as possible].

*And your petitioner prays that this court will determine the respective rights of the several parties in the premises herein set forth.*

*Salem, September 1, 1896.*

*John Smith.*

The petition should be sworn to, and a certificate of the oath, in the following form, attached:—

*Essex, ss. September 1, A. D. 1896. Then appeared the within named John Smith, and made oath that the statements made in the within petition are true, of his own knowledge,*

<sup>1</sup> Add this clause, if necessary.

except as to matters which are therein stated to be on his information and belief, and as to those matters he believes them to be true.

Before me,            *Aaron Lanson*, Justice of the Peace.

The decree is drawn by the attorney of the petitioner or of the party in whose favor it is rendered. Under the proper caption of court, place, date, etc., it should briefly recite the contents of the petition; that the parties have been duly notified, and have appeared and been heard, and that after hearing the evidence offered by each of the parties, and having considered the matter, the court finds, adjudges, orders and decrees that, etc.

#### PETITION FOR INSTRUCTIONS.

A petition for the instruction of the court upon some doubtful matters within its jurisdiction is similar in form to the general petition in equity. The questions for the court to consider, if more than one, should be numbered, and be asked in a simple manner, as, for instance, "Have said trustees power to convey the real estate of said deceased under and by virtue of said will, without license from the court?" The petition should indicate, either expressly or impliedly, that it is necessary that the instructions be given at that time.

The following is the form :—

To the Honorable the Judge of the Probate Court in and for  
the County of *Essex* :

Respectfully represents John Smith of Salem, in the county of Essex, as he is trustee under the will of Dorcas Smith, late of said Salem, deceased, petitioner, that he brings this petition

against John Jones of said Salem and Andrew Wilson of Danvers, in said county of Essex, respondents, and alleges them to be all of the parties interested in the matter of said petition, as he is informed and believes, and further represents that Dorcas Smith of said Salem [etc., stating the facts briefly], according to the directions in said will; that your petitioner is uncertain as to what his powers and duties in the premises are, and he therefore prays the instructions of this court upon the following interrogatories: [Insert them in a simple form]. And also such further instructions as to your honor seem to be proper and necessary in the premises. *John Smith.*

*Salem, Mass., Feb. 15, 1895.*

This should be sworn to as in the ordinary petition in equity. The order of notice to the respondents is in the following form :—

On the foregoing petition the petitioner is ordered to notify all persons interested to appear at a Probate Court to be held at *Salem* [on a certain day and hour named therein], to show cause, if any they have, against the same, by delivering a copy of this petition and order thereon to each person interested who may be found in said commonwealth, fourteen days at least before said court, or if any person shall not be so found, either by delivering a copy thereof to them wherever found, or by leaving a copy thereof at their usual place of abode, or by mailing a copy thereof to them at their last known post-office address, fourteen days, at least, before said court; and also, unless it shall be made to appear to the court, by affidavit, that all of said persons have had actual notice of the proceeding, by publishing the same once in each week, for three successive weeks, in the newspaper named therein, the last publication to be seven days at least before said court.

The decree is drawn by the attorney of the petitioner.



## CHAPTER XIII.

### MISCELLANEOUS JURISDICTION.

#### ASSIGNMENT OF LIFE INTEREST IN REAL ESTATE TO WIDOWS.

When a widow is entitled by deed of jointure, or under the will of her husband, to an undivided interest in his real estate, either for life or during widowhood, if her right is not disputed by his heirs or devisees, the probate court in which her husband's estate is being settled may assign such interest to her, in whatever counties the lands lie, by proceedings similar to the assignment of other life interests, as stated on page 167.<sup>1</sup>

#### AS TO ABODE OF CHILDREN IN HOMES, ETC.

Whenever a parent or guardian of a minor child, who is indentured or placed in charge of a person or persons, association, or public or private institution by a state, city or town board, or by a public or private corporation, or body of persons authorized by law to indenture or so place minor children, or in case of the death of both parents and there being no guardian, whenever one of the next of kin of such child is denied information of its whereabouts by such board, corporation, or body of persons, the probate court for the county in which

<sup>1</sup> P. S., c. 124, § 10.

the child has its legal residence may by its order, upon the petition of such parent, guardian, or next of kin, and upon such notice as it deems proper, if in its opinion the welfare of the child and the public interests will not be injured thereby, require such board, corporation or body of persons to give such information and permit such parent, guardian or next of kin to visit the child at such time or times, and under such conditions as the court in its order directs, and the court may, upon the application of such parent, guardian, or next of kin, or of any such board, corporation, or body of persons, revise and alter such order, or make new orders or decrees in respect to such petition as the welfare of the child and the public interests may seem to require.<sup>1</sup>

#### JUVENILE OFFENDERS.

Judges of the probate courts, except in Suffolk county, may commit boys to the reform school, receiving complaints, issuing warrants, and hearing cases against juvenile offenders at such times and places, in or out of their respective counties, as convenience may require, under the provisions of P. S., c. 89.

#### COMMITMENT OF LUNATICS AND DIPSO MANIACS.

Judges of the probate court have jurisdiction, concurrent with the inferior common law courts, in the commitment of lunatics and dipsomaniacs to hospitals, and with like proceedings.<sup>2</sup>

<sup>1</sup> St. 1896, c. 288.

in amendment thereof.

<sup>2</sup> P. S., c. 87, § 11, etc.; and acts

## HABEAS CORPUS.

Any person who has reason to believe that any other person is deprived of his liberty or held in custody, in violation of St. 1894, c. 536, § 1, may petition the probate court of the county in which such person is believed to be detained, stating the following facts, so far as known to the petitioner:—The name, age, and general description of the person deprived of his liberty or held in custody; where, when, and under what circumstances said person was deprived of his liberty; the name of the person so depriving him of his liberty, if known; where said person is believed to be detained; the names of the supposed custodians of such person, and any other facts and circumstances known to the petitioner relevant to the matter. The facts set forth in the petition must be verified by the oath of the petitioner.<sup>1</sup>

Upon the filing of such petition the court issues an order of notice to, and it is served upon, all the supposed custodians or persons alleged to be detaining or holding the person in custody, as stated in the petition, or otherwise known, directing such custodian or person to appear before the court at a time or place named therein, to be examined as the court directs, and also, in its discretion, cause the person so alleged to be deprived of his liberty, or held in custody, to be brought before the court, to be examined as the court directs as to his desire to be discharged from custody and as to any other relevant matters.

The court may, in its discretion, examine the wit-

<sup>1</sup> St. 1894, c. 536, § 2.

nesses separately and apart from each other, and may permit the petitioner, parent, guardian, or other person entitled to the custody of a person deprived of his liberty to examine publicly the alleged custodian of such person, in person or by counsel, as to the condition of the person alleged to be deprived of his liberty or held in custody, and the place where he is detained or held in custody ; and may also examine separately and apart, or publicly, the person alleged to be deprived of his liberty or held in custody, and may make any order for his release, or may make an order permitting correspondence or personal interviews between him and his friends or relatives ; and the court may modify its order from time to time upon such notice to the parties as it deems proper.

The court may request the district attorney to be present and conduct or assist in conducting the examination. If the court is unable to obtain satisfactory information, or to satisfactorily determine the questions involved, or to furnish proper relief, it must so notify the district attorney, who may institute proceedings under P. S., c. 185, or such other proceedings as the nature of the case may require.

The expense of the service of process and notices and of summoning witnesses must, upon the approval of the court or of the district attorney, be paid out of the treasury of the county in which such person is detained, in case the petitioner is not able to pay the same.



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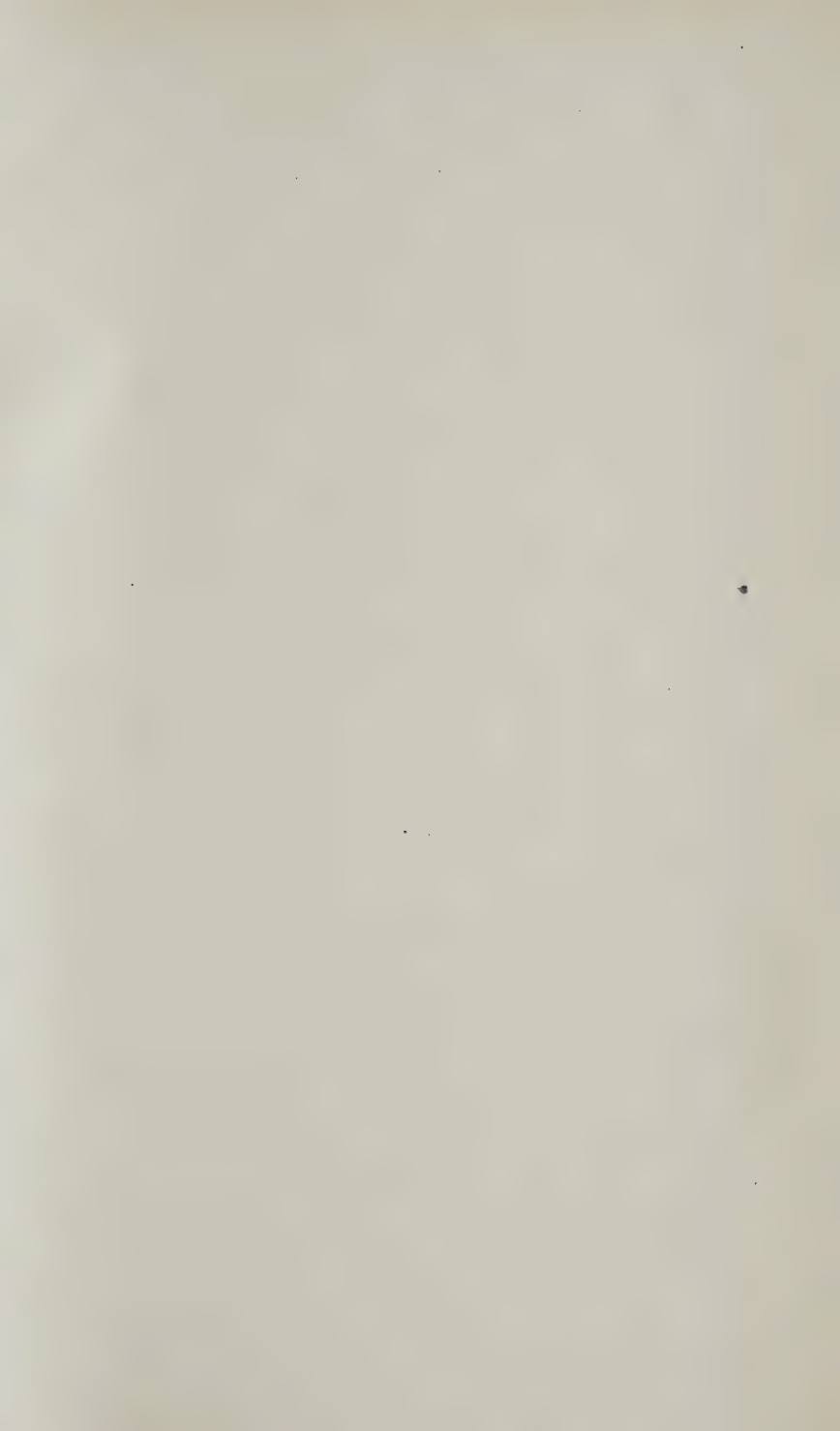
## WILLS

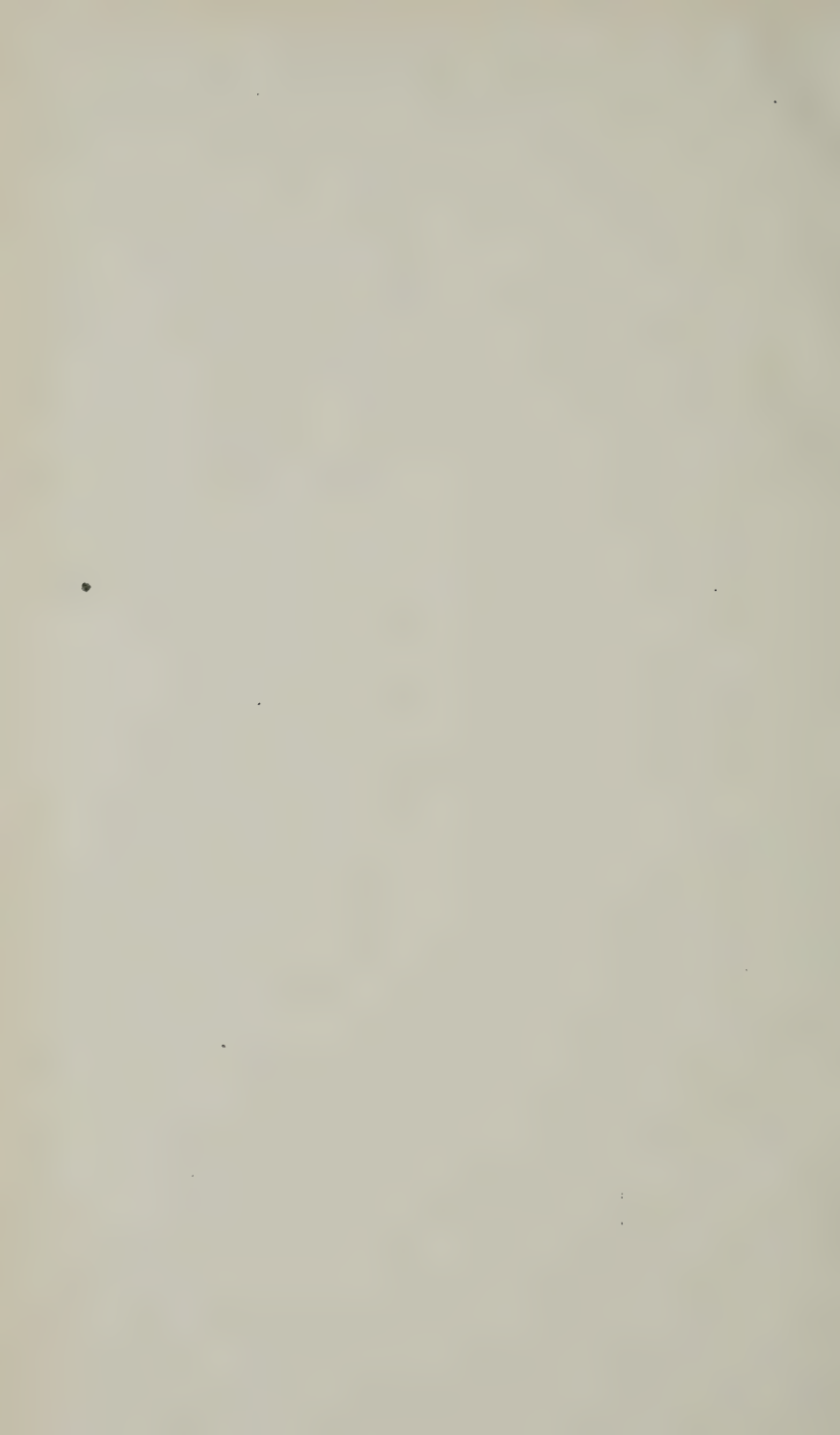
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